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In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,
v.
DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOINT APPENDIX

Volume II

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[Transcript of a portion of the trial held on May 13, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes the testimony of Mrs. Jean Arin, Core Evaluation Administrator for the Town of Burlington public schools, a witness called by the plaintiffs, found at Transcript Volume I, pages 66-118, and reproduced in the Record Appendix, Volume II, pages 66-118.]

[66] JEAN ARIN, Sworn
Direct Examination by Mr. Berman

Q Please state your name.

A Jean Arin.

THE REPORTER: Spell your last name, please.

THE WITNESS: A-r-i-n.

Q And where do you live?

A Lexington, Massachusetts.

Q What is your profession, please?

A I'm Core Evaluation Administrator for the Burlington Public Schools.

THE REPORTER: Core what, please?

THE WITNESS: Core Evaluation Administrator for the Burlington Public Schools.

[67] THE REPORTER: Thank you.

Q. How long have you held that position?

A Seven years.

Q And will you please tell her Honor what your background in education are for you to become Core Evaluation Administrator.

A I have a Bachelor's degree in Elementary Education and Special Education from Fitchburg State College; a Master's degree in Special Education from Indiana University; and graduate work at Indiana University and UCLA.

Q And what is your experience, please, in the field of education?

A I have been Director of Special Education at the Lexington Nursery/Kindergarten School in Lexington. I was also the Special Education teacher at Glendale High School in Glendale, California. I was also the Principal of the Headly School, which is a training school, a self-contained school for multiply-handicapped youngsters at Indiana University.

I've also been Principal of Temple Shalom Elementary Religious School; Principal of the Concord-Lincoln Jewish Study Group School in Concord; also supervised a pre-school program at Temple Emunah in Lexington, and Second Grade teacher there; a [68] regular Sixth Grade classroom in Monrovia, Indiana.

I believe that's it.

Q When did you come to work for the Town of Burlington?

A August 1975.

Q And are you still employed there?

A Yes.

Q And have you been employed there continuously ever since?

A Yes.

Q What are your duties as Core Evaluation Administrator, please?

A My responsibilities include the supervision of the evaluation process for all children who are referred for a determination of Special Needs.

It is my responsibility to insure that evaluations are carried out for these children and that if, indeed, any Special Needs are found, then educational planning is developed for them.

It's also my responsibility to direct staff members to carry out various assessments to make those determinations.

And also coordinate the meetings and act as full Chairperson for these meetings.

Q Did you ever come across Michael Panico as a student?

A No.

[69] As a student?

Q I mean — I'm sorry. Strike that.

Did you ever become aware of a child named Michael?

A Yes.

Q When was that, please?

A On June 3rd, 1977.

Q And how did you become aware of it at that time?

A I received a telephone call from Mr. Panico, requesting if I could carry out an evaluation for his son.

Q Did you carry out an evaluation at that time?

A Yes, I did.

Q And —

THE COURT: Mrs. Arin, what does an evaluation mean?

THE WITNESS: An evaluation, first, the first step is that there are a number of people that may make a referral. A parent, a teacher, a guidance counselor, a principal, any member of the school staff, may make a referral indicating that there's some need for the child and that the child is not progressing at the rate they think the child should.

THE COURT: That's how you start the evaluation.

THE WITNESS: Yes.

THE COURT: But then what does the evaluation [70] itself consist of?

THE WITNESS: There are two elements. There is either a full evaluation of a partial evaluation.

A full evaluation —

THE COURT: What was done in Michael's case?

THE WITNESS: A full evaluation.

THE COURT: Okay. Then let me hear what that involved.

THE WITNESS: A full evaluation entails a medical report indicating how the child is doing physically. It also contains —

THE COURT: How do you get that?

THE WITNESS: We get that through a series of forms that are sent out to the parent at the time of referral.

THE COURT: So the medical report comes from the child's own physician?

THE WITNESS: It's a form that we present from our packet, but it is sent to the parents, to the parents' own pediatrician.

In that same packet of referral is the Home Assessment Form, permitting the Social Worker to either make a visit at the home or in the school with the parents to determine developmental issues prior to the child coming to school, and any home environment [71] or how the child relates in playing outside with neighborhood children, et cetera.

THE COURT: Where does the Social Worker come from? Is that person on the staff of the School System?

THE WITNESS: Yes. The Social Worker is part of the full team.

THE COURT: So the Social Worker visits the home?

THE WITNESS: Or the school at the parent's discretion. The parent has the right to choose either a home visit or a school visit to meet with the Social Worker.

THE COURT: But it's a visit with the parents?

THE WITNESS: Yes.

Essentially, the Social Worker tries to gather a parental view of what the issues surrounding the youngster are.

THE COURT: What's the next item?

THE WITNESS: The next item will be, according to the area of need on the referral, will be a learning assessment, usually carried out by the resource person, the Learning Specialist.

THE COURT: That is a teacher within the School System?

[72] THE WITNESS: Correct.

THE COURT: Who reports on his or her observations of the child?

THE WITNESS: No. It is a person within the School System who is a specialist in testing the youngster for any types of learning problems.

THE COURT: So is the child tested at that point?

THE WITNESS: Yes.

THE COURT: Within the School System?

THE WITNESS: Yes.

In addition, there is a Speech and Language Pathologist who tests the expressive and receptive language level of the youngster.

THE COURT: Is that part of the learning assessment or is that something different?

THE WITNESS: That can be part of the full evaluation. It's not necessarily always included.

THE COURT: Let me go back a moment.

When you started to explain the learning assessment, you told me it was based on testing in the school. But what is the testing, now?

THE WITNESS: The testing is usually learning disability screening, tests like the ITPA, the Detroit Test of Learning Disabilities, various assessments [73] that the Learning Specialist will give, according to what the referral needs indicate. Then those types of tests are selected for testing.

In addition, the Learning Specialist may also give achievement testing on how the youngster is functioning in reading, writing, arithmetic, spelling within the classroom.

THE COURT: And then you were talking about a Speech Pathologist?

THE WITNESS: Yes.

A Speech and Language Specialist is also another professional staff member who may be included on a full team if the referral indications are such that there's questions about auditory processing; if there's questions about expressive language; if there may be simple speech indications, like stuttering, lisping, et cetera.

THE COURT: Was that used in this case?

THE WITNESS: No. The speech and language assessment was not carried out.

THE COURT: Then what's the next step?

THE WITNESS: The next step would be the Classroom Teacher's Assessment. And that is a form that is handed out from the evaluation where the teacher writes down the best type of physical area where the [74] child learns best in small groups or separately, one to one; teachers' impressions of how the youngster is doing academically within the classroom; what reading group they're in; what various math groups they're in; their overall behaviors in how they are completing tasks, et cetera.

THE COURT: And the next step?

THE WITNESS: A Psychological Report is carried out.

THE COURT: Where does that come from?

THE WITNESS: That's from the Staff Psychologist who is also a member of the full team.

THE COURT: And docs that involve testing or interview or what?

THE WITNESS: Testing.

THE COURT: So a Psychological Report based on testing?

THE WITNESS: Yes.

THE COURT: That's done within the school, as well?

THE WITNESS: Yes.

THE COURT: What else?

THE WITNESS: There is also an Educational Status Review, which is done by the Building Counselor of the youngster, which is overall a survey of the types [75] of services within the school that the youngster has received that are outside the areas of Special Ed. For instance, remedial reading, Title I tutoring, any type of special help, adaptive physical education that a youngster has had.

THE COURT: Anything else?

THE WITNESS: I believe that covers it.

THE COURT: Now —

THE WITNESS: I'm sorry. There could be — forgive me. There could be a Vision & Hearing that may be —

THE COURT: That wasn't involved here?

THE WITNESS: No.

That could be carried out by the nurse if there's any question that the child may not be hearing. A screening would be done by the School Nurse to make that type of determination.

THE COURT: Now, of the various things that you have mentioned that constitute an evaluation, a full evaluation, did you have, in this case, the medical report?

THE WITNESS: Yes.

THE COURT: And the home assessment?

THE WITNESS: Yes.

[76] THE COURT: And the learning assessment that was based on the particular screening that had reference to the referral needs, but not the speech and language specialist?

THE WITNESS: Correct.

THE COURT: And did you have classroom teachers assessments?

THE WITNESS: Yes.

THE COURT: And a psychological report?

THE WITNESS: Yes.

And forgive me, there was one more report that we included in that, and that was a Reading Specialist who is not necessarily on the full team, but can be requested to use her services to do a total reading test. The Reading Specialist within the building, just to test the youngster on reading level. And that was also carried out, because that was the primary need for the referral in '77.

THE COURT: Does the Reading Specialist do testing?

THE WITNESS: Yes.

THE COURT: You call this a Reading Specialist Assessment or what?

THE WITNESS: Reading Specialist Assessment.

THE COURT: Now, when you have collected [77] all of these test results and assessments, what's the next step?

THE WITNESS: Once all the tests have been completed, then a date is set up in order to share all the assessments with the parents. And all the team members come to the —

THE COURT: Does that have a name?

THE WITNESS: It's called the Team Evaluation Meeting.

THE COURT: I'll learn a whole new language.

Okay.

At that, you share with the parents the results of the testing?

THE WITNESS: Yes.

THE COURT: Do you make recommendations at that time?

THE WITNESS: Yes. It is presented orally; and after the meeting, a packet of the assessment is sent to the parent and to

whomever the parent wishes the information to go. The parent can sign a Release of Information if the parent wishes to submit all the information to a hospital or a counseling clinic or any external agency that might support the child.

THE COURT: And then what happens?

[78] You shared with the parents.

THE WITNESS: At that meeting, a determination is made through that team evaluation process whether or not a special need exists, according to those assessments.

THE COURT: And if it does?

THE WITNESS: And if it exists, then an Individual Educational Plan for the child is developed.

THE COURT: All right.

I guess that's, at least for the present purposes, the end of the line; is it not?

MR. BERMAN: May I just understand whether that was for '77 the answers were given with this, specific answers? I know you were generally going into the process.

THE COURT: Well, I understood that Mrs. Arin testified that these various things were done, except there was no Speech Pathologist, but there was a Reading Specialist Assessment, and that all of these things were, in fact, done with Michael.

And I understood not in '77, but in —

THE WITNESS: This was on June 23rd, 1977.

THE COURT: Oh, in 1977.

MR. BERMAN: Yes. Thank you.

Q Mrs. Arin, based upon the assessment, did you, in fact, [79] develop an Individual Educational Plan for Michael for the school year 1977-1978?

A No.

Q And will you explain why you did not?

A The assessments, as they were presented, showed that the home assessment, in essence, showed that Michael was not liking school; that he was fearful of making —

THE REPORTER: Michael was what, please?

A Not liking school. That is what the parents shared with the Social Worker. Not liking school and fearful of making mistakes.

Also in the home assessment came out that the parents had hired a tutor for reading for the summer for Michael. The parents also raised to the Social Worker the issues surrounding the retention issues that were coming up in June of '77.

THE REPORTER: Tension or retention?

THE WITNESS: Retention.

A [Continuing.] The psychologist's report indicated that there were attentional factors that were poor for Michael, but he saw no severe emotional problems that might impact upon his education. He found, however, that his motivation for achievement was low.

The Wechsler Intelligence —

Q Mrs. Arin, I don't want to interrupt you, but the [80] question was: Why you didn't develop an IEP for the 1977-'78 school year?

A According to the assessments, there were no special needs that were indicated.

Q All right.

Directing your attention to the 1977-1978 school year, were you again made aware of Michael in the course of that year?

A Yes, I was.

Q And did you, at the end of that year, devise an Individual Educational Plan for Michael?

A Yes.

Q Will you tell her Honor what that plan was?

A It was a plan based upon the assessments from the Mass. General Hospital, submitted from the Cortical Function Laboratory. It included an Individual Educational Plan that called for Michael to be in the Learning Center for one hour a day, five days a week.

THE COURT: Wait one second. Let me go back a moment.

You developed an Individual Educational Plan for Michael in June of '78?

THE WITNESS: It was in March of '78.

THE COURT: In March of '78.

[81] And that was without going through this entire process again, but on the basis of new information that had come to you; is that correct?

THE WITNESS: That's correct.

THE COURT: And that new information was a report from where?

THE WITNESS: Mass. General Hospital, Cortical Functions Lab.

THE REPORTER: Cortical?

THE WITNESS: Cortical Functions Laboratory, I believe is the title.

THE COURT: And that plan was developed to be implemented during the 1977-'78 school year?

THE WITNESS: It was to be implemented within ten days after our meeting, March 1978, through March of 1979.

Q Did you present this plan to Mr. and Mrs. Panico?

A Yes.

Q Did they accept it?

A Yes.

Q Was the plan implemented?

A Yes.

Q Now, was the plan implemented exactly as you devised it?

A Yes.

[82] Q And there's been — there is a —

THE COURT: I'm sorry to interrupt again.

And that planned called for what?

THE WITNESS: Learning Center Specialist, five times a week, for 50 minutes. And counseling, one time a week, for 30 minutes, with the School Counselor.

Q Will you please tell her Honor what the Learning Center is?

A The Learning Center is an environment within the regular school building that has youngsters who are in need of remediation or reinforcement of particular skills to maintain them at grade level or to improve their level in whatever academic area of need is required.

It is a setting where there are small groupings with a Learning Center Specialist. It's also a center where youngsters can come in and lead back to the mainstream, according to their needs.

Q Now, who is the Reading Specialist in the Learning Center that was assigned to Michael?

A Kathryn Black.

Q Was she a regular teacher of the Town, a regular Reading Specialist of the Town?

A Yes.

Q At some time Mrs. Black had another student assigned [83] to her; is that correct?

A Yes.

Q And this was during the hour in which she met with Michael?

A Yes.

Q And was that part of your plan?

A No.

Q Was that contrary to your plan?

A Not necessarily, no.

Q How did Mrs. Black's plan work, please?

A I'm sorry. I didn't hear your question.

Q How did Mrs. Black's — no, my question is so bad.

Will you describe the procedures under which Mrs. Black was to operate with Michael under your plan?

A Under the plan we had developed, Michael was to report to the Learning Center to Kathryn Black, sit down with him

and do various activities to help him in his phonetic development and to increase his reading skills.

Q Would he spend the full 50 minutes with her?

A I'm sorry?

Q Would she spend the full 50 minutes talking to him?

A Not necessarily.

Q Well, what would she do?

[84] A She might spend a considerable amount of that time talking with him, but then give him independent work to complete.

Q Now, in March of '79, was there a suggestion for another evaluation?

A I —

Q Or in the spring of 1979, was another evaluation suggested?

A Yes.

Q By whom?

A It was suggested by me in a telephone call to Mr. Panico.

Q And was this full evaluation carried out?

A Yes. With the exclusion of the Social Worker's assessment and the medical assessment.

Q Why was the Social Worker's assessment excluded on this occasion?

A The Social Worker's assessment is usually done at an initial full Core and not required to be done for three years hence.

Q Why was the medical assessment excluded at this evaluation?

A The parents had been continually involved with Mass. General Hospital and medications for Michael, surrounding his migraine headaches. And at that time, [85] Mr. and Mrs. Panico were in relatively close contact about changes in medication and the needs for Michael. And so that a medical evaluation might seem redundant at that time since he was under medical care.

Q Was the panel to receive or were the Core evaluators to receive these medical assessments that were being done at the Mass. General Hospital?

A We had asked for them. We did not receive them. Only through word of the parent.

Q Did you ask — whom did you ask for them?

A In 1979?

Q Please.

A I don't believe I asked for them.

Q Didn't you just say the parents were asked for them?

A Yes. I had constantly been asking the parents for various assessments. They sent us the assessment in '78 from the Cortical Function Lab., and that was the only one we received. And one letter from Dr. Lott, explaining that Michael was making progress.

Q Directing your attention to 1979, did the parents participate in the Core evaluation?

A Yes.

Q And was there a team assessment?

A Yes.

Q And where did that take place, please?

[86] A At the Memorial School.

Q And will you tell me who participated in it, please?

A Yes. To the best of my recollection, it was the classroom teacher, Sally Hennessy, John McAleer, Myra Fournier, Kathryn Black, the parents and myself.

Q And what date was that, please?

A That was on June 4th, 1979.

Q How long did the assessment last?

A Team meeting?

Q Yes. The team meeting last?

A The team meeting lasted about, I would say, an hour and fifteen minutes. I don't remember exactly.

Q When it was over, did the parents say anything concerning it?

A They talked about the possibility of carrying out an independent evaluation at that time through Dr. Lott.

Q Did you form an opinion, based upon the meeting, as to what would be an appropriate placement for this child for the 1979-1980 school year?

A Yes.

Q And what did you consider would be an appropriate placement?

A I believed that John McAleer's classroom would be the appropriate placement.

[87] Q And will you state the reasons why you concluded this?

A Yes. Michael's progress in reading, although during the year it showed some improvement, was still not improving to the area that we felt his potential might be able to go.

Also, he was still unable to take the phonetic skills and apply them to a fluid reading approach.

Counseling reports from the counselor also suggested that he was still having trouble expressing his feelings, getting along well, in feeling himself that his own self-worth was being questioned with the counseling sessions, and she felt that perhaps additional counseling might be necessary outside of the school.

THE REPORTER: Outside of the school?

THE WITNESS: Yes.

Q Did you at some time draw up an Individual Educational Plan for Michael for the 1979-1980 school year?

A Yes, I did.

Q And when did you do that?

A I did that on June 26th, 1979.

Q And will you explain to her Honor why you waited from June 4th to June 26th to draw up an Individual Educational Plan for this child?

A In discussions with the parents, we had received a [88] number of the assessments through the annual review that we

had held in June. And clearly, there were a number of assessments that the parents were confused about. They wanted to be able to get other additional information. They also had an appointment scheduled with Dr. Lott and wanted to be able to go over the assessments with him.

In addition, at that time, I suggested to them that perhaps they would like a totally independent evaluation, and they said they would think about that. I asked them if it would be all right if I contacted Dr. Bauman for an individual evaluation to be held. They said, fine, go ahead, but they'll call me back regarding their decision either to go with Dr. Lott or to go through with Dr. Bauman.

I contacted Dr. Bauman, made arrangements for her to have an independent evaluation for Michael. It was the very end of the year and she very cooperatively consented that she would do it in light of the difficulty at the close of the school year.

On, I believe it was, May 30th or 31st, I can't recall, that I received a note that Mr. Panico had chosen to do all the evaluations at Mass. General and that there would be further evaluations coming.

At that point, I told him that, fine, I'll [89] be happy to hold up the writing of an IEP until those evaluations are in, and then we'll be able to present it.

Q Did you ever receive those further evaluations?

A No.

Q Why did you then prepare the report which you were holding up?

A I'm sorry?

Q Why did you then on June 26th prepare this report that you had been holding up until these evaluations came?

A A telephone call came into my office to my secretary. It was a telephone call from Mr. Panico, stating to my secretary that he was demanding the Educational Plan; it was already ten days overdue, and that he was planning to reject it anyway.

At which point, I proceeded to draw up an Individual Educational Plan. And that — oh, I'm sorry — he was going to contact the Superintendent that I had not fulfilled the ten days.

Q I show you a document which I believe — if your Honor please — is in evidence as — I'm sorry, I must have gotten the wrong sheet and wondering why I can't find it.

It's in evidence as S — it's the [90] Individual Educational Plan of June 26th or 27th.

THE COURT: Is it in the record appendix?

MR. BERMAN: It's not in the record appendix, your Honor, but it's an exhibit, and the exhibit numbers are listed in the record appendix, which is why I'm referring to to the record appendix. I know —

MR. ROSENBERG: P-41

THE COURT: P-41?

MR. ROSENBERG: It's in both sets of exhibits.

MR. BERMAN: It is in P-41 and it's also an S exhibit and I just can't find it as an S exhibit.

I think the two references are S-47, which is the Town's exhibit, and P-41, which is the parents' exhibit. I believe it's the same thing.

THE COURT: Am I to take from this that there are two copies of virtually every document in this bunch? Only of some?

MR. ROSENBERG: I believe of some, your Honor. I was not at the Administrative Hearing, but there are two sets, one of the parents' exhibits, one of the Town's, a lot of them are duplicative. And the Bureau's, I beg your pardon. There are also some exhibits from the Bureau.

MR. BERMAN: There's a vast amount of duplication, your Honor. It is S-47.

[91] Q Would you please identify the sheet in front of you?

A It's the Educational Plan for Michael Panico for the period covering June 1979 to June 1980.

Q And who drew that plan?

A I did.

Q And have you an opinion, first of all, as to whether that plan adequately addresses the problems of Michael for the 1979-1980 school year?

A Yes.

Q What is your opinion?

A I believe it adequately meets the needs that Michael was evidencing at that time.

Q And will you give the basis for your opinion?

A Michael's reading was not progressing. He needed to learn the application of phonetic skills. He was still having difficulty in the fluency of reading. He needed to improve his handwriting skills. He needed to get a better understanding with directionality for his handwriting.

Also lists areas of emotional needs, like self-confidence in the academic areas, to provide him with success oriented activities where he could gain that. Also would avail him of an opportunity to be able to express his feelings. And also to improve his attention span and diminished distractability, [92] and to be able to function —

THE REPORTER: Diminished what, please?

THE WITNESS: I'm sorry?

THE REPORTER: Diminished what?

THE WITNESS: His distractability.

A [Continuing.] And also permit him to carry out independent tasks with completion, independently.

Q And do you know a person named John McAleer?

A Yes, I do.

Q How long have you known him?

A For seven years.

Q And in what capacity have you known him?

A I've known him as the teacher for the transitional classroom at the Pine Glen School. And I am the Core Evaluation Administrator.

Q In the summer of 1979, how many times had you been in his classroom?

A Perhaps three times. In the spring, summer of —

Q I'm sorry. Prior to that time?

A Oh, prior to that time?

Q Yes. Prior to the summer of —

THE COURT: Mr. Berman, the Reporter has lost you.

MR. BERMAN: I'm sorry.

THE REPORTER: The spring and summer of [93] what?

MR. BERMAN: Why don't I start over?

THE REPORTER: "In the summer of 1979, how many times had you been in his classroom?

"Answer: Perhaps three times. In the spring, summer of. . ."

THE COURT: What was the remaining answer?

THE WITNESS: In the spring of 1979, from March to June, I was probably in Mr. McAleer's classroom about three times.

Q And prior to the summer of 1979, how many times total have you been in Mr. McAleer's classroom?

A Approximately 25 to 30 times.

Q How many times had you met with Mr. McAleer outside his classroom?

A Approximately 90 to 100 times.

THE COURT: Are you asking professionally, socially, or otherwise?

Q Were all these meetings professional meetings at your request?

A Sadly, yes.

Q Now, did you have an opinion as to whether Mr. McAleer could implement this plan that you had drawn up for Michael?

A Yes.

[94] Q And what was your opinion?

A My opinion was that John McAleer could implement the plan for Michael Panico extraordinarily well.

Q And will you give the basis for that opinion, please?

A Yes. In the past years at Burlington, John's classroom was a highly structured environment. We had placed children in his classroom previously. John McAleer was an extraordinarily sensitive teacher, able to understand what the needs of the children were, and to provide for them academically, according to those needs on an individual basis.

He also permitted opportunities within that classroom for children to develop self-esteem, for children to be able to feel comfortable with their accomplishments, and to be able to meet with success.

Also, within the building, Mr. McAleer had demonstrated, repeatedly, his ability to take the youngster from his classroom and, when appropriate, move that youngster into a mainstream environment, within those subject areas, that the child had made significant and adequate progress.

John McAleer was constantly in touch with parents, holds monthly meetings with the parents of the children in his classroom to keep them abreast of the children's progress within the program.

[95] Moreover, Mr. McAleer is a teacher within the building and has access to the remaining staff where he can share very closely any mainstreaming needs of any children that he would be able to provide — that he would be able to transfer over to a mainstreaming type program.

Q Have you an opinion as to whether or not educating Michael in Mr. McAleer's classroom in the 1979-1980 school year would have been educating him in the least restrictive environment in which he could be educated, consistent with his educational need?

A Yes.

Q What is your opinion?

MS. JANOS: Objection.

THE COURT: Is there an issue about that?

MR. BERMAN: Well, your Honor, it certainly is one of the issues that is opened up by the general issue. There are three considerations I —

THE COURT: What does "least restrictive" mean?

MR. BERMAN: Well, I —

THE COURT: What's your objection, Ms. Janos?

MS. JANOS: My objection is that is a matter for the Hearing Officer and for you to decide. That is an issue in the case, final determination.

[96] THE COURT: Oh, of that issue, I'll take her expert opinion, if it's relevant.

But I don't understand what "least restrictive" means. Maybe you better explain.

MR. BERMAN: Very good.

Q Will you explain to her Honor what you meant by the least restrictive environment?

THE COURT: I think of it in terms of mental hospitals and either keeping people in or taking them out.

A The least restrictive environment, as I understand it, is an environment wherein a youngster will be able to function, according to what his needs are, in a separate area. And then, at the same time, have an opportunity to be mainstreamed in those areas that he can.

"Least restrictive," within the setting of John McAleer's, it is in a public school, it therefore provided the opportunity for mainstreaming as soon as possible.

Q And did you have any intention to suggest mainstreaming to the parents as soon as possible if Michael had been placed in that classroom for the 1979-1980 school year?

MR. ROSENBERG: Objection.

[97] THE COURT: Sustained.

MR. BERMAN: I offer to prove that the answer would have been yes.

Q Did you ever talk to Michael's parents about mainstreaming from John McAleer's classroom?

A I personally?

Q Yes.

A Yes.

Q When?

A I believe it was at the June 4th meeting when Mr. McAleer was present at the meeting, and Mr. McAleer described his program and the opportunity for mainstreaming.

Q What did you say?

A I said that, indeed, we had done it in the past and we would continue to do that, particularly in Michael's case, where math was an area, would be the first area we would look to mainstream him.

Q Why would math be the first area in which you would look to mainstream him?

A That was his most successful area of academic functioning.

MR. BERMAN: I have no further questions of Mrs. Arin.

THE COURT: Mr. Rosenberg.

MR. ROSENBERG: Yes, thank you, your Honor.

[98] Cross-Examination by Mr. Rosenberg

Q Mrs. Arin, is it my understanding that what the phrase you just discussed with her Honor, "least restrictive," also contains another adjective after that, "least restrictive appropriate" plan?

A I'm sorry. I don't understand your question.

Q The plan that must be drafted under the Chapter 766 Regulations must not merely be the least restrictive plan, it must be the least restrictive appropriate placement?

A Adequate and appropriate.

Q Okay.

A Correct.

Q Now, at what point in time was — let me strike that.

Did you, Mrs. Arin, made the decision yourself to place the child in Mr. McAleer's class?

A No.

Q Now, who made that decision?

A That decision was based upon the assessments of the team members; that I took those assessments and shared those assessments with the Director of Pupil Services.

Q And that Director was —

THE COURT: The question was: Who made the decision?

[99] THE WITNESS: I made the decision for placing.

Q Now, you made the decision to place Michael in Mr. McAleer's class?

A Correct.

Q Not Mr. Foley?

A Correct.

Q And when did you make that decision?

A That decision was finally — the final part, was thought about in May. The final decision for it came in June of '79.

Q Now, you have testified to a meeting in June, on June 4th, 1979, which is what we call the Core Evaluation Meeting; is that right?

A That's correct.

Q Okay.

Now, in fact, Mrs. Arin, wasn't there a prior meeting in May of 1979, May 25th, to be precise?

A Yes.

Q Okay.

And who attended that meeting?

A That was Mr. Cavanaugh, myself and Mr. and Mrs. Panico.

Q Now who is Mr. Cavanaugh?

A Mr. Cavanaugh is the School Psychologist on the staff of the full team.

Q Incidentally, Mr. Cavanaugh was not present, was he, [100] at the June 4th, Core Meeting?

A That's correct.

Q Now, on May 25th, you also notified, in a formal way, the Panicos, that there would be a full Core Meeting on June 4th; is that correct?

A That's correct.

Q Now, would you please tell her Honor what it was that precipitated your meeting on May 25th with Mr. Cavanaugh and the Panicos?

A I received a telephone call in May from the Building Counselor telling me that various assessments had been shared at the Memorial School surrounding Michael's progress. I asked her what assessments were carried out. She told me. I asked her if there were psychologicals carried out; she said they were not.

She also told me that the same issues of retention were being raised again. She also told me that the parents were very dissatisfied with the way things were going at the Memorial School.

Q Now, this person to whom you're referring is Myra Fournier? Is that the —

A Myra Fournier.

Q Okay.

And her position is precisely what?

A School Counselor at Memorial School.

[101] Q Now, did you not also receive on May 24th a report by Mr. Cavanaugh concerning Michael?

A The written report, no.

Q Did you receive a verbal report from Mr. Cavanaugh?

A He had told me that he was prepared to meet with Mr. and Mrs. Panico to share the results of his testing.

Q Okay.

And when did you schedule the May 25th meeting.

A I scheduled that with Mr. Panico, I believe it was the day after I — or the day of, that I spoke with Myra Fournier. He had told me that he was going — that he was confused.

It is in the record, I believe, the notes. That he was confused. He did not know which way to go. He had heard a number of assessments at the Middle School. He did not know what to do about retention. And that I asked him, "Are there any other issues?"

He said, he perhaps wanted — I asked him, would he want a psychological done? Is there anything else that he might want done? And then told him that we would reconvene for a full team meeting to share all these assessments in June.

He then told me he was going to be going to Dr. Lott, could I have the psychological assessment before his meeting with Dr. Lott, because that was [102] going to take place sometime at the end of May.

I said I would do what I could and get back to him. I spoke with the School Psychologist. He told me he could do the psychological, he could carry out a WISC and a T.A.T. and give the result to the Panicos.

THE REPORTER: Carry out a what, please?

THE WITNESS: A Wechsler Intelligence Scale for Children and a Thematic Apperception Test.

A [Continuing.] Carried them both out for Michael, and then we could meet on the 25th and present those findings.

Q Now, let me just make sure I understand it.

Is your answer to my question that you called Mr. Panico on May 24th?

A No.

Q When did you call Mr. Panico and tell him that you scheduled a meeting for May 25th?

A I don't remember that.

Q Do you remember —

A I —

Q I'm sorry. Will you finish your answer?

A Yes. I believe it was sometime after speaking with Myra Fournier, but I don't remember when.

Q Do you know when you spoke with Myra Fournier?

[103] A I would like to check in the record, if I may?

Q You may check it in the record.

A Yes. In my record, a telephone call on 5/18/79.

Q That's the telephone call that you received from Myra Fournier?

A That's correct.

Q And that was the event, was it not, that started the entire process of developing the plan in question in this situation?

A That's right.

Q Okay.

And you had a meeting on May 25th?

A Yes.

Q Would it refresh your memory, Mrs. Arin, for me to tell you that in your testimony at the Administrative Hearing you testified that it was on May 24th that you called Mr. Panico and invited him to a meeting on the 25th?

A I can check here. I don't remember that far back. I can check it.

Q Do you have records —

A I do believe I may have called him to tell him that we could schedule the meeting, that Mr. Cavanaugh had completed the testing, and that's what it was for.

[104] THE COURT: What's the purpose of this, Mr. Rosenberg? Are you trying to show that the parents were eager to meet with the school and made themselves available?

MR. ROSENBERG: No. I'll be perfect — I will explain to you what the purpose is, your Honor.

It is clear to me, and I hope eventually will be clear to you, that the entire — the primary motivation of drafting the plan and placing the child in the particular class was that the school at that time thought he had a primary emotional problem. And, in fact, I would like to proceed to ask this witness a series of questions that goes to that issue.

THE COURT: Yes, but what's the — I don't understand the import of the question as to the precise date on which the parents were invited to the May 25 meeting.

MR. ROSENBERG: Well, if I might ask one or two more questions, and if your Honor believes that the questions are irrelevant —

THE COURT: Go ahead.

MR. ROSENBERG: — I will have to live with that.

Q Is it not a fact, Mrs. Arin, that on May 24th you called up Mr. Panico and told him that you had received [105] a verbal report from Mr. Cavanaugh that Michael had severe emotional problems and you wanted to meet with the Panicos immediately?

A No, that is not true.

Q That is not correct?

A No.

Q Did you tell him that you had received a report from Mr. Cavanaugh that indicated that Michael had severe emotional problems?

A No. I told Mr. Panico that the psychological report was complete. And in the report, I wanted Mr. Cavanaugh to explain to him its findings.

Q And what were — I'm sorry. Are you finished?

A Yes.

Q And what were his findings with respect to Michael's emotional health?

A He found that he had a mild depression; that he was — had evidence of anxiety; that his competence, his self-competence was deemed in question. He had a good feeling about his body but that he was not feeling that he was able to do work well, He was not feeling good about himself.

Q Okay.

And did you not suggest, at the May 25th meeting with Mr. Cavanaugh, that because of his [106] emotional problems, Michael should be places in Mr. McAleer's class?

A I suggested that because of his academic and emotional problems, he needed to be placed in Mr. McAleer's class.

Q So you had already, I take it, informed the Panicos about Mr. McAleer's class?

A Oh, yes. At the May 25th meeting, I even encouraged Mr. and Mrs. Panico to visit the class. And they said they would, and we set up a meeting for June 2nd for them to visit the class.

Q Now, you testified earlier that the parents had requested that the Mass. General do some additional testing and evaluations of Michael?

A Yes.

Q There had been previous evaluations done at the Mass. General; had there not?

A Yes.

Q And those evaluations had indicated that Michael's problem was dyslexia; did they not?

A The Cortical Function Laboratory did not state that.

Q They didn't use that word; is that what you're saying?

A That's correct.

Q Did they find that he had visual-spatial and spatial confusion?

[107] A Yes.

Q Now, there was, was there not, also in the school record, a report from Dr. Melvyn Levine of Medford that there was an impression of dyslexia?

A That's correct.

Q Now, you testified, if I understood it correctly, that the Panicos had exercised their right to get an independent evaluation; that you were waiting for that evaluation but received a telephone call asking for the plan to be completed immediately; is that correct?

A Yes.

Q Now, the evaluations that the Panicos were waiting for were from whom?

A I believe they were going to be an assessment from Dr. Eisenthal at Mass. General Hospital.

Q And who was Eisenthal?

A He was a psychologist that was being referred to the Panicos by Dr. Lott.

Q And they were waiting for his assessment. Were they waiting for an assessment from Dr. Lott?

A I don't know that.

Q You don't know.

Am I correct that you have testified in your testimony at the Administrative Hearing, Mrs. Arin, [108] that even if you had seen the report submitted by Dr. Lott prior to preparing the plan, that would not have caused you to change your mind about what the plan contained?

MR. BERMAN: Objection. Materiality.

I withdraw my objection.

A That's correct.

Q Is Mr. McAleer's class the appropriate placement for a hyperactive child?

A It can be.

Q Is there any other class within the Pine Glen School in the academic year '79-'80 in which a hyperactive child could be placed?

A Yes.

Q Is Mr. McAleer's class the appropriate class for a child who has behavioral or emotional problems?

A I'm sorry?

It can be.

Q Is it the correct class for a child who has learning disability other than one that stems from emotional or behavioral problems?

A Yes.

Q Now, at the Core — excuse me, the Core Evaluation Meeting, was Kathryn Black present?

A The June meeting?

[109] Q Yes. I'm sorry. June of 1979.

A Yes. I don't — she was certainly invited on the memo. I don't know whether she was there or not. I can't remember.

Q What was Mrs. Black's involvement in the education of Michael?

A When? Are you talking about that meeting?

Q From March of 1978 until June of 1979, what was Mrs. Black's responsibility for educating Michael? What part did she play in educating Michael?

A She was a specialist assigned to Michael to help him improve his reading skills.

Q Would you say that in the Burlington School System, she was the person who had the primary responsibility for teaching Michael reading?

A Yes.

Q Did Mrs. Black concur with the decision to place Michael in Mr. McAleer's class?

MR. BERMAN: Excuse me, your Honor. I think that's immaterial whether Mrs. Black concurred or not.

THE COURT: Well, if there were people who were directly involved with Michael who may have expressed views concerning what was appropriate, why is that not relevant?

[110] MR. BERMAN: Well, because I don't think it —

THE COURT: The question is whether it was an appropriate plan in light of his needs at the time.

MR. BERMAN: Yes, but I don't think Mrs. Black has shown to have any expertness in this area. I mean, the fact that she was his reading teacher does not mean that she was in the position to decide whether or not Mr. McAleer's classroom —

THE COURT: Doesn't that just go to the weight of the testimony. It seems to me that this witness can tell us what was said at that meeting.

MR. BERMAN: If it is what was said at that meeting, fine.

A Okay. I have the Minutes here before me of that meeting. I cannot testify whether Kathryn Black was there or not. However, from the Minutes of that meeting, her report was shared. It said she gave him the space test. He improved one grade level. He attempted two-syllable words on word recognition tests. He had difficulty remembering, on a day-to-day basis, skills that were previous taught. And she mentioned that his oral reading was still not fluent, yet his comprehension was good.

MR. ROSENBERG: I'm going to repeat my [111] question.

THE COURT: Well, the answer clearly is that she doesn't know, because she's referring to notes that reflect only that reference to what Mrs. Black may have said.

MR. ROSENBERG: Okay.

Q Did Mrs. Black, at any time, prior to the preparation of the Educational Plan in question, tell you that Mr. McAleer's class was not the appropriate placement for Michael?

A She never did.

Q She never told you?

A No.

Q Do you know whether she told anybody else?

A I don't know.

Q You don't know?

A No.

Q Do you know what her opinion is of that subject?

MR. BERMAN: I pray your Honor's judgment.

THE COURT: Sustained.

Q And your testimony is you don't know whether — you don't recall now whether Mrs. Black was at the Core Meeting?

A That's correct.

Q Who was at the Core Meeting?

[112] A I have the notification sent that invited to the meeting was Sally Hennessey, John McAleer, Myra Fournier, Richard Cavanaugh, Kathryn Black, Becky Silverstein, Mr. Barows, Mr. and Mrs. Panico and myself.

Q I understand you have the notice.

Do you know which of those individuals, in fact, were there?

A I believe — I don't remember who was there.

Q Do you —

A I do remember John McAleer being there. I do remember myself being there. I do remember Sally Hennessy being there. I do remember Myra Fournier being there.

Q Do you remember that the Panicos were there?

A Oh, yes.

Q But you don't remember whether Mrs. Black was there?

A I don't remember.

Q Was Mr. Cavanaugh there? Do you remember that?

A I know that he was not there.

Q Was Mrs. Mason there?

A No, she was not there.

Q Was Mrs. Meade there?

A No, she was not there.

Q The only one you're not sure about is Mrs. Black; is that correct?

A That's correct.

[113] MR. ROSENBERG: Excuse me for a moment.

Q You testified earlier, I believe, with respect to the 1977 plan; is that correct?

A I'm sorry, would you restate the question?

Q Actually, I'll rephrase that. I'll withdraw that question.

You testified, did you not, that there was a Core Evaluation Meeting in June of '77?

A That's correct.

Q And as a result of that evaluation, I believe you said, no Educational Plan was, in fact, drafted?

A That's correct.

Q By the way, did you send or did someone from the school send a letter of no special needs to the parents?

A A letter of no special needs —

Q Right.

A — was not sent to the parents.

Q Okay.

Now, you also testified that there was a subsequent Core in March of 1978; is that correct?

A That's correct.

Q And in March of '78, as a result of that Core, there was, was there not, an Educational Plan?

A. That's correct.

Q Now — excuse me.

[114] MR. ROSENBERG: My associate is reminding me of what exhibit number this is.

Q Now, I'm referring to Parents' Exhibit 17, specifically Page 6.

Do you recall precisely, Mrs. Arin, what provision was specified in the plan for individual reading for Michael?

A Are you talking 1978-1979?

Q March '78 plan to March '79, yes.

A Kathryn Black was to see Michael five times a week.

Q Do you recall whether there was a specific amount of time that she was supposed to see Michael?

A I believe it was — I'd have to check.

50 minutes.

THE COURT: Five oh?

THE WITNESS: Five oh.

Q Mrs. Arin, I'm going to show you what I represent to the Court is the plan. Would you just make sure it is the plan in question?

A Yes.

Q And how much time is, in fact, reflected on the plan?

A One hour per day.

Q And what does it say, precisely?

A "Additional information: Reading, individual, one hour per day. Counseling: 30 minutes per week."

[115] Q And is it your testimony that during the period that this plan was in effect, Michael, in fact, received one hour of individual reading?

A Yes.

Q Okay.

Now, did I notice that you were referring to notes during your testimony?

A Yes.

Q May I see those notes?

A Certainly.

THE WITNESS: Is it all right?

MR. BERMAN: Certainly?

MR. ROSENBERG: Okay?

THE WITNESS: I was just asking my counsel if it was all right.

MR. BERMAN: Oh, certainly, by all means.

Q Did you prepare these notes?

A Yes, I did.

MR. ROSENBERG: Thank you very much.

We have no further questions. Thank you.

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[116] Redirect Examination by Mr. Berman

Q With respect to your decision to place Michael in Mr. McAleer's class, did you have the ultimate power to make that decision or did someone else have it?

A Someone else has the ultimate power.

Q Who has that power?

A Kevin Foley.

Q And did you ask him to approve your decision?

A Yes.

Q And did he do so?

A Yes.

Q Can you tell me why Mr. Cavanaugh was not at the June 4th meeting?

A He had the opportunity to share his assessment with Mr. and Mrs. Panico on May 25th.

Q And was his report shared, also, at the meeting with the other people there?

Was Mr. Cavanaugh's report shared at the meeting of June 4th?

A Yes.

Q Do you know whether or not Mr. and Mrs. Panico came to Mr. McAleer's class on June 2nd, 1979?

A I do know.

Q Did they?

[117] A No, they did not.

Q Can you tell me why a letter of no special needs was not sent in September of 1977?

A Yes. I sent a letter to the parents, Mr. and Mrs. Panico indicating to them, discussion held at the actual meeting in June of '77. And that was that they were going to hire a tutor, and they wanted to help Michael over the summer with the tutor.

At that time, I asked Bev Reber if she would be willing to meet with the tutor so there could be a continuity of services for Michael and exactly what Michael's reading needs were and share them with the tutor so they could continue in the same way for progress.

Also, Mr. and Mrs. Panico wanted to wait to make a decision for promotion or retention in the fall of that year. I told them that would be fine. There were no special needs that we saw

that would require an Educational Plan at that time. And perhaps remedial reading, whatever their decision was, for the second grade.

Q By the way, was Michael involved in Mr. McAleer's class in the 1979-1980 school year?

A I don't know that.

Q The 1979-1980 school year, whether Michael was enrolled, you don't know that?

[118] A Yes —

THE COURT: Is there any dispute about that?

A In 1979-'80, he was, I guess, on the mailing list for the Pine Glen School. I don't know.

Q Do you know if he was enrolled in that class in that year?

A No, he was not enrolled in that class.

Q And prior to that time, do you know whether the School System had ever agreed to his being enrolled in any other class?

A The School System had not agreed.

Q Had not agreed?

Thank you.

MR. BERMAN: No further questions.

THE COURT: Anything else, Mr. Rosenberg?

Recross-Examination by Mr. Rosenberg

Q Have you ever met Michael?

A Not directly, no.

MR. ROSENBERG: Thank you.

THE COURT: Thank you, Mrs. Arin.

[Transcript of a portion of the trial held on May 13, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes a portion of the testimony of Mr. John McAleer, Special Educator at the Pine Glen School, Burlington, Massachusetts, a witness called by the plaintiffs found at Transcript Volume I, pages 132-159, and reproduced in the Record Appendix, Volume II, pages 132-159.]

[132] JOHN McALEER, Sworn

Direct Examination by Mr. Berman

Q Please state your name, sir.

A John McAleer.

Q And where do you live?

A Medford.

THE REPORTER: Spell your last name, please.

THE WITNESS: M-c-A-l-e-e-r.

Q And what is your employment, sir?

A Special Educator for the Town of Burlington.

Q And how long have you held that employment?

A Eight years.

Q And will you tell me what your education is to become a Special Educator?

A I received my Bachelor's from Providence College. I received the Master's in Special Education from Boston College. My C.A.G.S, which is a Certified Advanced Graduate Study degree, is pending presently at Northeastern.

Q Have you taught in any other School Systems besides the Burlington System?

A No.

Q Now, calling your attention to the school year 1978-'79, what school did you teach at?

[133] A Pine Glen.

Q And the school year 1979-1980?

A The same. Pine Glen.

Q And —

THE COURT: I'm sorry. Pine Glen?

THE WITNESS: Pine Glen.

Q Where is your classroom located in the Pine Glen School?

A It's located on the second floor.

Q And calling your attention to the school year 1979-1980, did you have any assistance in your classroom?

A Yes, I did.

Q And what form does that assistance take?

A I had an Assistant Paraprofessional in the classroom part time.

Q And what was his or her name, please?

A Her name is Adrianne King.

THE REPORTER: Who?

THE WITNESS: King, K-i-n-g.

Q How many students did you have enrolled in your classroom in the 1979-1980 school year?

A Six.

Q And —

THE COURT: Does that mean there were only six students in your classroom throughout the day?

THE WITNESS: The total number I was servicing [134] was six.

The most that would ever be in that classroom at one time would be six children.

THE COURT: When a child was assigned to your classroom, did that child spend the entire day in your classroom?

THE WITNESS: Not necessarily, no.

THE COURT: Did any of them spend the entire day in your classroom?

THE WITNESS: A minimum number would. At the point of having six children, I would say one or two would spend 100 percent of their time with me. The majority would be integrated or mainstreamed into the regular classroom for whatever academic situation they could handle.

THE COURT: And then spent part of the time in your classroom?

THE WITNESS: And then come back to me at the appropriate times designated.

THE COURT: And what grades did you service?

THE WITNESS: At that time, the school was from first to fourth grade, and the children at that time, I believe, were between second grade to fourth grade of age.

THE COURT: The children that — the six, [135] all of the six children?

THE WITNESS: All of the six children were from either from the second, third, fourth grades.

THE COURT: Am I correct, that the total number of children that availed themselves of the services of the McAleer classroom were six, or that is the maximum number that was in your room at any one time?

THE WITNESS: At that time, at that year, I had six children on my roster. Okay?

At certain times, certain numbers of those six would be out of the classroom in the regulars.

THE COURT: I understand.

Q Mr. McAleer, was yours a classroom devoted to children who had Special Education needs?

A Yes.

Q What were these needs, please?

A The needs were basically those of both academic and somewhat social and behavioral. Academic, they were behind grade level. Social, ranged from a variety of situations.

Q And did you come up with a plan by which you could both teach these children and control their behavior while they were in the classroom?

A Yes.

Q Will you tell her Honor what your general plan was [136] for controlling behavior in your classroom?

A Okay. The classroom that I teach is a structured classroom where the room is broken up into different sections. Each section has a designated function. All of this is based on what is called the Behavioral Modifications System. So that when the child does perform adequately and appropriately, they are rewarded in the Chip System.

This Chip System provides a very formal — a highly structured environment whereby the children know what is expected of them, what happens when they do not meet the criteria, and what does happen when they do meet the criteria.

We have a group learning section to the room. We have an individual where everybody has their own desk. And we have a free time area, and we have a game area.

When the children do perform academically, they are rewarded in the Chip System, which means they have their individual contract. When they finish, they come to me or they raise their hand, whatever is appropriate at the time, and I immediately reinforce them by checking their work. If the work is appropriate they they receive a chip for that work. As the chips accumulate, what they can do with these chips is [137] if they want to take free time, we have stove timers and they take these chips and so many chips equal to free time. Okay?

So in the course of a morning, as reward, they get rewarded three ways: Initially by the chip, yes, I was good. Secondly, they also get rewarded by being able to take free time. And we have that game area set aside. Thirdly, at the end of the week, we keep a running score of how many chips they have accumulated and a certain number of chips equal a certain prize at the end of the week.

So what this does is to reinforce all along, on a weekly basis, what work they are doing, what behaviors they do exhibit, and they know immediately whether it has been acceptable or not.

THE COURT: Do I understand that you have three functional areas: The academic, the free time, and the games area?

THE WITNESS: Yes.

THE COURT: What does "free time" mean?

THE WITNESS: Free time means when they have accumulated the chips in the system that I have established, they are able to go into the free time area and get one of the appropriate designated games out, as a reward, to play.

[138] THE COURT: The games area is just a storage area —

THE WITNESS: It's just a section of the room — it's a section of the room where there are shelves and the games are on the shelf, and there's a play area in front of it.

THE COURT: So that they really, the children have two functions, they perform two sets of things in your room. They do academic work and if they are rewarded, they go to the free area and do games?

THE WITNESS: Well, as in any room, there's recess, and this is their form of recess. Yes.

THE COURT: No, I didn't understand. The games area is simply like a closet holding the games?

THE WITNESS: Well, not necessarily.

What happens in the room, it's sectioned off by dividers and chalk boards. Okay?

And there's one large area where we do the academics; another section behind a divider, where the game reinforcement type of area is; Reading — when I'm saying "games," at this point, I'm saying reading games, math games, language games.

In the back of the room, we have more dividers and behind cupboards and different things, there's a section of the room divided to give them an area to [139] spread out and play their games that are free time games. Monopoly, whatever the case may be.

THE COURT: So the games perform both as a teaching function and are used as part of the academic part of the classroom —

THE WITNESS: Correct.

THE COURT: — as well as being used during the free time or fun?

THE WITNESS: Free time. Correct.

THE COURT: Insofar as academic and fun are different.

Q Mr. McAleer —

A I — I'm sorry. Go ahead.

Q Mr. McAleer, at some time did you become aware of a child named Michael who was to be enrolled in your class in the 1979-1980 school year?

A Yes, I did.

Q Did you review an Individual Educational Plan that had been prepared for Michael?

A Yes, I did.

Q Did you review his full record?

A Yes, I did.

Q And based upon your review, did you come to a conclusion as to whether or not you could implement that plan?

A Yes, I did.

[140] Q And what was your conclusion?

A That I could implement the plan.

Q Now, I'm going to show you —

MR. BERMAN: I think Mrs. Arin — excuse me — has walked off with mine.

Q I'm going to show you the Individual Educational Plan that was devised for the 1979-1980 school year.

A Yes.

Q I'm going to ask you to look at the general and the specific objective of that plan, and then I'm going to ask you how you would have implemented each of these objectives.

THE COURT: The question is: How would you have implemented the objectives set forth in the Individual Educational Plan for that year?

MR. BERMAN: Yes.

MS. JANOS: Objection.

THE COURT: What's the objection?

MS. JANOS: The first objection is that without having specifically read that part, I would assume that all of this has been in the Administrative Hearing record and is before you.

And the second objection is I understood your pretrial order to be not what would have happened, but what he was —

[141] THE COURT: No. That was only with respect to what progress the child would have made. That's a different question.

I will allow this testimony.

MR. BERMAN: Thank you.

A Okay. The first general objective is for the child to obtain grade-level reading skills. That is No. 1.

Q Would you tell us how you would have implemented that objective?

A Under No. 1, there are eight specific areas dealing with the reading area.

How I would have implemented the academic reading skill area would be: Michael obviously had concerns in his ability to read and was behind grade level. My particular classroom uses what's called a Grush Reading Program.

THE COURT: Better spell that.

THE WITNESS: G-r-u-s-h.

A [Continuing.] The program is a phonetic program, phonetic meaning for every letter there was a sound. It's not a sight, it's a phonetic-based reading program.

What would happen in the case of Michael, yes, he was — had been afforded the opportunity to learn these sounds according to their symbols, but had not obtained the fluency.

[142] This reading program that I utilized would utilize the knowledge that he had at that time and then take it one step further and develop his fluency.

How that would happen would be using phoneme cards, templates and blocks, which would put words together, form words that he would have to sound out.

From that base, in the Grush program, you go into what's called word families. An example would be all words similar to lake, take, make, would be utilized. He would learn all in one set. So he would learn what's called a word family.

And we progress from there, and it is a hierarchy of progression, so that everything that he learned is a foundation in the step to what the next step would be.

The Grush Program has a ten-step level, learning style, where the first one being coated a red one. There are twelve initial consonants that the child has to learn, associated with six short vowels, blend them together, go to the next step, once that has been attained.

That would be attained by constant repetition, by constant practice of sounding out the cards, putting those cards together and blocks and sounding out words.

Thus, we not only learn this consonant sounds [143] but also learn fluency. After certain words have been established —

THE COURT: How do you do that? You just pronounce the sounds to the child and ask him what it is?

THE WITNESS: To teach a child an initial consonant involves a lot of steps. He sees the letter. Okay? Then you have to give him the sound. You can give him the sound verbally, as I would to you, as an individual. That is not enough. So with Michael, you would put it, also, on a tape. You would give him pictures.

He knows, he can identify the picture of it, but —

THE COURT: What do you do, give him just the one sound, and if you're talking about the M, for instance, you just say "mh"?

THE WITNESS: Right. Well, you would initially give him that sound. He would have to reproduce that sound himself. Okay?

So he knows what he's aiming for. You give him pictures, "mh," mitten, mailbox. He knows, he can identify those, he can say those words, but he cannot read those words. But what he is doing is identifying the first letter on each word. Okay?

[144] Then you write the word out for him and he sees, he associates the sound "mh" with the Letter M. Okay?

That's how you get the sound similar relationship and you build upon that.

How would you build upon that? You build upon it by working through workbooks, by using a tape recorder, on having words said with the initial consonant M, as you just pointed out, and having him repeat those.

The visual, the Helen Grush Program is a program which is called multicentering, which means to see, to hear it and to write it. The more senses taken into account, the more learning you understood, the more learning would become involved. It would help him more. He needed the visual and the auditory and written. If all three were involved, the ability to help him learn would be greater, and we build upon that. Once certain words were formed, then we put those words into sentence form on what he already knew, and build a fluency on that regard.

So, as a result, what we do, would be to raise his reading level as fast and as smoothly as we could, but always on the premise that what he knew before has been the foundation and that it has been [145] established and it works upon the other, and it's step progression.

The specific areas deal with a lot of these reinforcing activities to help in the fluency. They deal, a couple of them deal with being able to break a word into its syllable forms. Syllables are the parts of a word. If a child can know the rules

for syllabication, to divide the word, then when he sees a word, such as a two-syllable word, where Michael was at when he would have come to me, it would not have been threatening for him in order for him to break it into syllables. That's part of our reading. We do that automatically. Certain children do not. You have to teach them steps in order to see a word, break it into its parts and sound it out. That would have been another step.

Another one would be adding suffixes, which are the endings to words, again fluency. Prefixes, again adding fluency. And what you're doing all the time is he has a base knowledge of the word, such as "make," you add the ending "making," the fluency is increased. And then you build upon that.

Talks about reinforcing short vowels. All this time, you're not working in isolation. You're going back and reviewing. With these children, constant [146] review, constant practice is of utmost importance. So everyday review of what the knowledge has already been established is constantly reviewed so that he understands that all of this is put together. Things are not in isolation, which often happens with these children. They learn one isolated incident and then many times they can't relate it to the next step.

So what this program does is to constantly draw back on previous knowledge to build upon, so that they attain the fluency all along.

And then it goes on to talk about reading without hesitancy, fluency, in the regular classroom, and developing his sight word vocabulary.

It cites here a Dolch List. A Dolch List is for each grade level, they have established what is called by the man, Dolch, a Dolch List. And certain words —

THE COURT: Will you spell that for the Reporter, please?

THE WITNESS: D-o-l-c-h.

And certain words at each grade level, a child has to know. The English language is, unfortunate only 40 percent regular. And as a result, many words are irregulars. The word "the," the initial "th" is not like the initial "th" that we sound sometimes.

[147] A number of words, "us," "the," examples of first grade sight word vocabulary in the Dolch List that he'd have to know. And you just memorize. So what you do is you constantly practice and teach the child these words and build upon these, in relation to the Grush Program with the phonetic base program.

That, basically, would have been the reading program.

Q Would you proceed with the other objectives?

A No. 2, the general, is to apply mastered phonetic skills to reading.

THE REPORTER: Apply what, please?

THE WITNESS: Phonetic, p-h-o-n-e-t-i-c.

A [Continuing.] Basically, what I said before, of associating a sound to a letter.

The specifics on that would be, again, using the Helen Grush Program, basically what I have already stated.

To increase visual memory for sight vocabulary. Again, going back to the Helen Grush Program, word families are of the utmost importance here.

Children of this type not only sound out words, but use configuration of words.

THE COURT: Of what type?

THE WITNESS: Learning problems in reading [148] areas.

A [Continuing.] When they come, what they have to do is pick up tricks of the trade that ordinarily come to us. Configuration of a word is very important here. All words end "a-m," they know it's a short, but all the letters are low letters, and that kind of helps them in the mind.

THE COURT: What kind of letters?

THE WITNESS: Say all the words end in "a-m," ham, tam. Okay?

THE COURT: Beam?

THE WITNESS: Beam?

THE COURT: B-e-a-m.

THE WITNESS: No, that's not a — that doesn't fit.

THE COURT: It doesn't fit?

THE WITNESS: You're throwing in a double vowel and it doesn't help.

"a-m" is a specific configuration in this program. And that configuration adds — you just change the initial consonant. You change the initial consonant, they know the ending is the same, not only by sound but by configuration. A short "a" and a short "m", letterwise.

It's hard to explain, but as you see, certain [149] children, they learn configurations.

Building upon that, as well as word families, that also helps. We also spoke about, for sight, knowing the Dolch List. You just have to learn certain words in the English language because they are so irregular.

To continue to develop decoding and encoding. Encoding being spelling. Decoding being the reading.

Most children with reading —

THE COURT: Why does one call it encoding and decoding when all you're talking about is spelling and reading?

THE WITNESS: You have your language, we have ours. I don't know.

In order for the child to spell that has reading difficulties, most of them also have a spelling difficulty. This program not only helps a child to read, but to spell simultaneously. So every time he is reading the word, he's also seeing the word and he's writing. So he gets all three components in, and that's called multisensory, as I said before.

Constant reinforcement of the spelling to raise the spelling level.

The decoding is to break the words down into its parts, similar to phonetic skills. Changing [150] initial consonant letters, giving him all, as I said, "am" words, ham, give him one word, okay. The next word will be tam. What's the initial consonant? How did it change?

To develop all reading fluency. Most children with reading problems have fluency problems, not only because of the reading problem, but because of self-confidence. They've had failure, they don't like to read out loud. They don't like to read in the group situation. But it is a necessary skill in order for the teacher to realize if this child can read.

THE COURT: But are children in your classroom, the children that have the problems that you describe, are they able to express themselves articulately?

THE WITNESS: Most definitely.

Most of them have very high vocabulary. Most of them are aware of the situation, they are average intelligence or above, and they know that they are expressing difficulty in comparison to the children in the regular classroom.

THE COURT: Do they understand the meanings of the words they use?

THE WITNESS: When they speak to me?

THE COURT: Yes.

[151] THE WITNESS: Most definitely.

So we're not talking about any intellectual retardation or anything in that regard, if that's what you're asking.

THE COURT: No. I wasn't asking anything specific. I was just wondering, when you talk about teaching them ham, tam, slam, bam, or whatever, whether these children who apparently have trouble translating from a page into a spoken word, whether they can otherwise express themselves and understand, know and understand the words.

THE WITNESS: Most definitely.

And just to highlight, as we go over each word individually, a definition is given for each word. Such as a word such as "tam," is a difficult word for a child, because many people do not wear tams anymore. But we have pictures for them and we give a definition for that. Okay? It's a hat.

A [Continuing.] To increase auditory and visual sequential memory.

It's been stated before, there is a concern about memory, both in the auditory and visual. This would be done by giving the child — first, I would do it visually, where he would be given a sequence of three blocks. I put a card in front of it and [152] I could mix the blocks up. Be three different colors, a red, a blue and a yellow. He would have to come back and put the blocks into the sequential pattern that I did.

That would be, initially, to develop a memory pattern. All this being a foundation to work up to being able to express himself in a sentence, putting things in order, sequentially.

Continuing academic growth in subject areas spelling, math, written and oral.

Somebody already spoke about math, he seemed to approach grade level.

Initially, what I do with the child, such as Michael, would be to test him myself, even though testing was done, for my benefit so I know on an individual basis exactly where he stands, so that when it's time to integrate the child for whatever his strength is, Michael being math, I know what teacher to put him with, what skills he knew exactly, and what skills to reinforce to get him to grade level if he wasn't already at it before he was mixed.

To improve handwriting skills. We have a handwriting program in our school which is given two or three times a week.

And to improve understanding of directionality.

[153] This is done — usually it's not only on a —

THE COURT: What is directionality?

THE WITNESS: Directionality is two-fold.

First, left to right. Okay?

Also, being able to go in a reading series from the left-hand side to the right is how we read. Okay? From left to right.

THE COURT: When you talk about directionality you're talking not about writing but reading?

THE WITNESS: It could be both. In this particular instance, I'm talking about writing. From left to right. In writing, we also go from left to right. When you come to math, you go backwards, when you're adding. Okay? Which can cause problems, because we go from right to left when we're adding in a column. And this is where a lot of problems come about.

A [Continuing.] In reading, specifically, what you do is to work on left and right coordination. After that's developed you put things together, in order, and then you work so that when it's time to put words into sentences, he knows to go from left to right, into that sequence. It's just repetition and patterning all the time. Whereas that comes naturally to us, some of these children, it does not come naturally [154] to.

That is the ninth and final general set of goals.

Q Would you continue on to —

A There's another one?

Q — 10, 11, 12 and 13?

A Oh, I'm sorry.

"10. To increase self-confidence in the academic areas."

The area of self-confidence is one of the main emotional concerns in my classroom. Most of these children have not had success in the regular classroom situation. They've all had some academic problems. As a result, they come with low esteem, low self-confidence.

What I try to do, through the Behavior Modification System, through the initial constant reinforcement of the —

THE COURT: That is the Chips Program?

THE WITNESS: The Chips Program, exactly.

THE COURT: I think I understand that.

Do you have a bookkeeper?

THE WITNESS: I do.

[Laughter.]

THE WITNESS: You laugh. I do.

[155] We have two sets of books. One for the assistant and one for me.

A [Continuing.] To reinforce the self-confidence, it's an ongoing thing and it's done immediately. Once an assignment has been given to the child, we want to correct it immediately, give the child the reinforcement, if it was done appropriately.

Initially, obviously, I want to give high success situations so that the child does have success and happiness right away. Learning does not have to be threatening. Learning does not have to be failure.

As that goes on, we develop by increasing the difficulty as time goes on, but also maintaining the immediate reinforcement, the immediate attention to the child.

This usually increases the self-confidence the child has: Yes, I can do; yes, I can produce.

What we do, we first go from a one-to-one situation with each child to a small group situation, so that it's less threatening. When I say "small group," I mean two or three, into a larger group situation.

The whole goal of the program, to go from my classroom back into the regular classroom, to the full mainstream.

[156] So what I want to do, the emphasis would be individual, help the child learn, build his self-confidence, go into a small group, go into a large group and back into the regular classroom.

"11. To be able to express feelings."

Most of these children, as you expressed before, know what's going on. They can express themselves. Some of them

have feelings, but very much aware of why they're this way. So when — usually on a daily basis, we talk about it: How did you do? This was well done. Why is it good? They have to express to me why they think they received the chip.

Three afternoons a week, we have what we call behavioral activities. We sit around in what's called many times, the magic circle. And we talk about what we need improvement on. We talk about ourselves, we talk about others in the classroom. All with the intent of: Yes, I'm good. Yes, I'm getting to know myself in relation to others.

So we're going, again, from the individual to the small group. We reach out.

"12. To improve attention span and diminish distractability."

The vast majority have attention span problems in my classroom.

[157] What I usually go, again, is to work on an individual basis. I try and limit the initial lesson to a short span of time so that there is not enough time for them to be highly distracted.

Again, going back to the Grush Program, you use the visuals, the tactile and the auditory to get all senses involved so they are definitively looking at what they're doing, rather than just listening, because that means the eyes are going to be wandering. Get all three involved. The more involvement, the less likely a distraction.

You go from the individual, again, with tapes, with pictures, with writing, crayons, whatever the case may be, a variety of materials, to a small group situation, learning to work with others without being distracted, into a large group situation.

Of course, this is done over a span of time. With each child, it varies.

Diminished distractability. I spoke about the dividers in the room. That's why we have dividers in the room. The classroom is structured enough, set up, if you do something, you know what happens, you know that it's routine, you know the situa-

tion. The dividers allow children to focus in without having to see what's going on over here.

[158] We have carrels. Carrels are learning boxes set up in the classroom on some tables, where they come in and they sit down and there's no distraction, they're in this little cubicle, as such. So there is no visual stimuli involving them or distracting them.

Finally, "13. To develop positive, independent work habits for task completion."

This, again, all the children in our classroom have problems working independently. If you have problems learning, it's just understood you're going to have problems doing something yourself. You've had problems and — if you've had failure, you don't want to even attempt a situation by yourself.

When they come to me: I need help. I need help. I need help. That's all you hear. I can't do this.

It's always on the negative vein. What we try to do, again, through the discussions, the building-up of the self, once you increase the self, you also increase the availability of the child to say: Yes, I can try. Yes, I can do it.

We use all those things and the Behavior Modification Token System. I have one page for you, Michael. That's an instance. Initially, make it [159] very easy, knowing he can do most of the work. I gauge a time. Say the paper should take five minutes at the most, I give him ten. I have a stove timer. So I set the stove timer for ten minutes and say: When you come to me — or when you are done, either come to me, if I'm available, or raise your hand.

When he does, it's usually before the timer goes off. There, initially: Isn't that great? I did this. I did it on my own.

From thereon, you pattern, you shape, you work the child up, you keep doing that and maybe in a few weeks it's two pages and a little more time, but not nearly the double time that's necessary.

And that's how you work on increasing the independent skills.

Basically, that's all 13.

THE COURT: Thank you.

[Transcript of a portion of the trial held on May 14, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes the remainder of the testimony of Mr. John McAleer, a witness called by the plaintiffs, found at Transcript Volume II, pages 2-3 to 2-32, and reproduced in the Record Appendix, Volume II, pages 2-3 to 2-32.]

[2-3] JOHN McALEER, Resumed

Continued Direct Examination by Mr. Berman

THE COURT: You understand, Mr. McAleer, that you are still under oath?

THE WITNESS: I do.

THE COURT: Mr. Berman, are you going to be referring to the IEP, again, that the witness talked about yesterday?

MR. BERMAN: Through Dr. Kinsbourne, yes, I shall.

THE COURT: But not now?

MR. BERMAN: Not now.

Q Mr. McAleer, based upon your knowledge and experience, have you an opinion as to whether you could have successfully implemented the Individual Educational Plan for the 1979-1980 school year?

A Yes, I do.

Q What is your opinion?

A That I could implement the plan.

Q Could you explain the basis for your opinion, please?

A I feel that I could implement the plan, first of all, because of my formal training, the Master's in Special Education, and the background I have.

THE COURT: Excuse me a moment.

[2-4] When you talk about implementing the plan, precisely what do you mean? To achieve the objectives or to do what you yesterday outlined what you would do in order to achieve the objectives?

THE WITNESS: Basically, both. To put into practice what I stated yesterday, and to do it successfully.

A [Continuing.] With the education, as I said. Also, because of the experience that I have had with children with similar needs to what Michael had.

I've had children in the past who have gone through the Grush Program where I have met success in the reading areas and who have been mainstreamed back into the regular classroom with a great deal of success.

The vast majority of the children that come to me have been successfully mainstreamed, so that by the time they reach Middle School, most of them academically have been in the regular classrooms, which is the ultimate goal of the program that I am in.

The other areas would be time. Do I have the time to give to this child, which is proportionate to his needs? Yes, I do have that time. I say that because the whole basis for the program is a small [2-5] case load. At that time there were only six children, with an aide. That would give me enough time to individualize, to give him the one-to-one attention that he needed.

The other area for the opinion would be the materials available. I have been afforded a number of a wide variety of materials through Burlington that utilize a lot of individualization backup for any kind of disabilities, a wide range of different programs in the Grush Program, as I stated before.

Q Mr. McAleer, since you have been teaching this class at the Pine Glen School, has any child ever been taken out of the class without the consent of his parents?

A No.

THE COURT: What do you mean?

THE WITNESS: Any time there is a change in the Educational Plan, any time —

THE COURT: Oh, I see.

Q Mr. McAleer, there is evidence in this case that Michael needed to be taught in a highly structured classroom and that your classroom was not a highly structured classroom.

Have you an opinion as to whether you have a structured classroom?

A Yes, I do.

[2-6] Q And what is your opinion?

A That the classroom that I have is very structured.

Q And will you explain the basis for that opinion, sir?

A The basis for that opinion is, as I pointed out and documented yesterday, the token system which I have initiated, because of that system and the rules and expectations of the children are very explicit. Each child knows what the routine is, what the expectations are, not only for himself, but for every other child.

Every child has a definitive contract during each day, individualized, that they have to follow. When that contract has been completed, they get immediate reinforcement, both in praise, attention and with chips. As a result, the child knows in a sequentional manner what is expected of him, when the contract is to be completed, and what the ramifications are for completion or not completing. Everybody knows what's expected of not only themselves, but of the others.

Q Does it distract the other children of the classroom when one child gets up, assuming that child has achieved a contractual status in which he can do so and goes to the free time area, game area, or whatever?

A Not usually.

MR. BERMAN: No further questions.

[2-7] THE COURT: Mr. Rosenberg, do you have any questions?

MR. ROSENBERG: Yes, I do, your Honor.

Cross-Examination by Mr. Rosenberg

Q Mr. McAleer, as of the June 4th, 1979, Core Meeting, what was your understanding of the particular problem that Michael had?

A After the meeting?

Q Yes.

A My opinion was that the child was exhibiting problems in the reading area, he was behind grade level, and that there was some behavioral needs.

Q Did you have an opinion as to whether Michael was or was not dyslexic?

A That term did not come up until later on. And I did not define it or label it at that point.

Q Did you at some point in time form an opinion as to whether or not the child was dyslexic?

A I formed an opinion that the child had a reading problem.

Q I appreciate that.

Did you form an opinion as to whether or [2-8] not the child was dyslexic?

A I'm trying to avoid labels. I guess I would have to say yes.

Q Okay.

And what was your opinion?

A That the child was dyslexic.

THE COURT: What does that mean, Mr. McAleer?

THE WITNESS: Dyslexia is basically a deficiency in the reading area.

THE COURT: Of any particular kind or just any deficiency? That is, when you say the child has a reading problem, is that synonymous with saying the child has dyslexia?

THE WITNESS: No.

THE COURT: Then dyslexia is a particular form of a reading problem?

THE WITNESS: It's not — dyslexia is a problem of integration, either in the auditory or visual channels. In this particular child, it seemed to be a problem in the auditory channel.

Q Well, Mr. McAleer, isn't dyslexia a far broader term than just reading disability?

A It can be.

Q And isn't dyslexia, in fact, a term for a neurologically based problem in the area of visual perception?

[2-9] A Yes.

Q And aren't there ordinarily numerous — strike that question.

And a dyslexic child can have many manifestations of his or her dyslexia; is that not true?

A As with any problem, yes.

Q But it is true of a dyslexic child?

A It can be true.

Q As you understood Michael's problems, did Michael have other manifestations of dyslexia other than a reading problem?

A I can't answer that.

Q Do you know one way or the other?

A Not right now, no.

Q Well, did you know in June of 1979?

A Not to my recollection, no, I don't.

Q Well, I want to make sure I understand that.

Do you recall whether or not you knew in June of 1979 whether Michael's dyslexia had other manifestations in addition to a reading problem?

A It manifested itself in other areas, yes.

Q Now, what other ways? What other areas?

A Self-confidence, his self-image. That type of — the emotional areas, it would, most definitely.

Q Did it manifest itself in the area of spelling?

[2-10] A At the June 4th meeting, I couldn't tell you if that was true or not. I would assume so. I automatically assumed that.

Q Well, did you at any time — let me strike that question.

Do you know, as we sit here today, as I stand and you sit here today, whether or not in the period of the spring to the fall of 1979, Michael's dyslexia manifested itself in any way, other than in reading problems?

A Yes.

Q In what other ways?

A As I just stated, in the self-confidence, in the — that would be an off-shoot of the dyslexia, for the self-confidence area, the self-image.

If you're speaking directly to other areas, academically, at this point I would have to say it had to exhibit itself, but I couldn't possibly say definitively it would in other areas. I can't remember reading, specifically, spelling areas, let's say, that it did manifest itself. I could not say that.

Q You don't know one way or the other whether it manifested itself in the spelling area?

THE COURT: He just said that, Mr. Rosenberg.

Q Do you know whether it manifested itself in the [[2-11] mathematics area?

A He had a strength that was math. It might have in certain particulars, but not across the board, to my knowledge.

Q Did it manifest —

THE COURT: Mr. McAleer, if you do not know the answer to a question, please tell us rather than guessing as to what might be.

THE WITNESS: Okay.

Q Did it manifest itself in the area of his ability to do handwriting?

A Yes, it did.

Q Did it manifest itself in the ability to write a thought in a sentence as opposed to just the physical act of handwriting?

A I'd have to guess. I don't know.

Q You don't know?

A I did not see anything in print.

Q You did not see anything in the records, is that what you mean, which indicated that?

A I do not recall anything in the records, specifically, for that area.

Q Okay.

Did it manifest itself in the ability of the child to tell time?

[2-12] A I don't know.

Q Did it manifest itself in the ability of the child to know left from right?

A Yes, it did.

Q Okay.

Was he incapable of differentiating between left and right?

A I can't say that he was incapable. He had difficulty. I can't say that he was incapable of it.

Q Okay.

Did it manifest itself in the ability of the child to differentiate between up and down?

A I can't answer that, no.

Q Was Michael functionally an illiterate at the point at which he was going to enter your class?

A Functionally illiterate?

Q That's right.

A Not to my knowledge, no.

Q He could read, in other words?

A Yes, he could.

Q Okay.

Do you know what his — what is the term "sight vocabulary" mean?

A Sight vocabulary —

THE COURT: What was the term again?

[2-13] MR. ROSENBERG: Sight vocabulary.

A Sight vocabulary refers to any words that have to be learned out of context with other phonetic sounds. They're just words that are words that do not follow the phonetic patterns and just usually have to be memorized.

Q Would the word "the" be an example?

A It could be, because it does not have the breath "t-h" sound.

Q Okay.

So you simply have to learn that, you cannot sound that out; is that what a sight word is?

A It's not the best example, but it could be, yes.

Q Well, would you give me an example that is a more precise example?

A "What" could be an example.

Q Okay.

Now, did Michael, to your knowledge, have a sight vocabulary of any number of words as of June of 1979?

MR. BERMAN: Objection.

A I couldn't tell you what it is.

Q You couldn't.

MR. ROSENBERG: I'm going to refer to the Educational Plan, your Honor.

[2-14] THE COURT: Well, if you're going to do that, let me see if I can find it.

MR. ROSENBERG: All right.

THE COURT: If you wanted to, you could help me find it.

MR. ROSENBERG: It's Parents' Exhibit 41.

Now, I'll be happy to search.

[Pause.]

THE COURT: Now, which part of this are you referring to?

MR. ROSENBERG: Your Honor, there's a section called "Addition to Individual Plan" that comes, actually after the signature page. I believe it's the 10th page. There are little

numbers down in the right-hand corner. And it says "Performance level."

THE COURT: Yes.

Q Mr. McAleer, the performance level that is being described as you understand it, was what?

Is that the performance level for Michael?

A As I understand it, yes.

Q And it's as of the time the plan was prepared?

A I presume so.

Q Okay.

So is my understanding correct that according to the plan, Michael had what is called 200 — what [2-15] you mean, his sight vocabulary is 200 words?

A That's what it says here.

Q Okay.

Do you have any reason to suspect that's not true?

A No.

Q By the way, a little further down there, there is a sentence that begins, "Michael is able to skim reading passages to locate details and overview idea."

Would you take a moment to read that again, please, to yourself?

[Witness complies.]

A Okay.

Q Is that quality consistent with a dyslexic child?

A It can be, depending upon the fluency of it.

Q So some dyslexic children would be able to skim a passage in the manner described there?

A Depending on how it is, yes.

Q Depending on how what is?

A How long the passage is; how prominent the idea is. It can vary, depending upon the involvement of the passage.

Q In skimming a passage, do you read every word?

A You're not supposed to, no.

Q What do you mean by the term, "skimming a passage"?
[2-16] A It means picking out the main ideas in the paragraph or whatever, you know, the passage is.

Q Does your ability to skim a passage depend on how many sight words you have?

MR. BERMAN: Objection to the form of the question?

THE COURT: No, I'll allow it.

A It can, yes.

Q Well, in what way does it not depend upon how many sight words you have at your command?

THE COURT: Mr. Rosenberg, aren't we going a little beyond the direct of this witness insofar as, aren't we now turning him into an expert on what dyslexia means?

MR. ROSENBERG: Well, your Honor, let me just think for a moment before I respond.

He has testified at some length, both today and at the Administrative Hearing, of why he is capable of implementing the plan. And it seems to me, I have not only the right but an obligation to make sure that he understands what is contained in that plan, including the description of the child's level of performance.

THE COURT: Okay.

MR. ROSENBERG: Would you please read the [2-17] question back to the witness?

THE COURT: Can you remember it?

MR. ROSENBERG: Let me see if I can.

Q In what — yes, I think I can.

Do you remember the question?

A You can try it.

Q I can try. All right.

In what way does skimming a passage for a dyslexic child not depend upon his ability to have a volume of sight words, a vocabulary of sight words?

A Well, if you're referring to his ability not to be able to read, what it does, it allows him to skip over those words, basically.

Q He skips over. . .

A When you're skimming.

Q When you're skimming, what words do you skip over?

A You're referring to what he is not able to do, it affords him the opportunity to skip over those words.

Q So, in other words, am I not correct, that in order to skim a passage, a dyslexic child only can rely on sight words?

A He should, if he's good at it.

Q Should he predominately rely on sight words?

A Well, if you're referring to — what I'm trying to say is that after a while, all words become sight [2-18] words to a good reader. So after a while, if he can recognize certain what we call phonetic words, those soon become sight words.

Q But at the point in question that's covered by this plan —

A Yes.

Q — according to the School's record, Michael had a sight vocabulary of 200 words.

It also says that he's able to skim passages, or words to that effect.

A Yes.

Q What I want to know is, in his skimming of passages, would he do that skimming solely by using the sight words or would he use some other technique to skim a passage?

A Oh, he'd use both techniques.

Q Both techniques?

A Sure.

Q He'd use a phonetic approach, as well?

A He would have to.

Q This is in skimming a passage, he would use a phonetic technique?

A For a child — for a child like Michael, he would have to.

Q And your testimony, so I'm clear on it, is that [2-19] skimming is something that a dyslexic child can do?

A I don't say that, no. I do not say that.

Q Well, do you say that a dyslexic —

A You're saying —

Q I'm sorry.

A — can Michael do that? Obviously, he can, from what was written there. I did not say that.

Q Can a dyslexic child skim a paragraph?

MR. BERMAN: Your Honor, I think this is about the third time that question has been put to the witness.

MR. ROSENBERG: If I have asked it before, I will withdraw the qustion.

Q Now, so I'm clear, were there going to be six children in addition to Michael, had he chosen to enroll in your class?

A Correct.

Q Now, as you have described Michael's problems, okay, how many other of those six children had Michael's problems?

A Specifically in the reading area —

Q Okay.

A — to that date, there were three children with similar problems.

Q Three out of the six?

[2-20] A No. Three out of — in the course of — when I teach, the average stay is two to three years in my classroom for the child, not full time. They are mainstreamed. So over the course of those five years, I had, I thought of this before, I think it was nineteen children over the course of the five years.

Over the course of the five years, nineteen children, three had been similar to Michael's needs.

Q Okay.

You've anticipated a whole different line of questioning, Mr. McAleer. Now, would you focus on the question I tried to ask? Maybe it wasn't clear.

Out of the six children who were, in fact, going to be in Michael's class, that particular year.

A Okay.

Q Okay?

How many of those children had problems similar to Michael's?

A I definitively can remember one at that point.

Q Okay.

Now that was — do you know how old — strike the question.

Do you know old Michael was at the time he was entering or supposed to enter your class?

A Well, he was going into fourth grade. That would have [2-21] made him possibly nine or ten.

Q Okay.

Now, how old was the other child who had Michael's problems?

A At that time, seven or eight.

Q Well, do you know whether it was seven or eight, Mr. McAleer?

A I don't.

Q Did that child, as far as you know, read at a level higher than Michael?

A You're going back five years. At this point in time, I could not tell you. I don't remember.

Q Well, let's be clear. I'm not going back five years. I'm going back three years.

A Well, three years.

Q You don't remember?

A I don't. I really couldn't tell you.

Q Was that child dyslexic?

A I don't use the term dyslexia. That term was never used in any of his writings, no.

Q As far as you know, he was not?

A The needs were similar, performance needs were similar.

Q Did that child have problems spelling?

A Yes, he did.

Q Did that child tell time?

[2-22] A At that point in time, I can't — I don't remember.

Most children at that age do have problems in telling time, seven or eight, when they come to me.

Q Now, did Michael need a significant amount of individual attention?

A I would say, as with all the kids in my class, when they first come, they certainly do.

Q And from your review of the record, did Michael need some individualized attention?

A Yes, he did.

Q During the previous academic year, that is, '78-'79, did Michael receive individualized help with his reading?

A Yes, he did.

Q Do you know how much he was receiving in the way of individualized help?

THE COURT: When was this, Mr. Rosenberg?

MR. ROSENBERG: During the year 1978 and ending '79 when the Core Evaluation and the Individual Educational Plan was drafted.

MR. BERMAN: I object to this question.

THE COURT: What's the objection.

MR. BERMAN: This man, by all the evidence, had nothing to do with him in '78-'79. Anything he would possibly speak about would be pure hearsay — [2-23] not hearsay in a technical sense, but it would be based upon what other people told him.

MR. ROSENBERG: I have several responses to that.

No. 1, the question is: Does he know?

If he does not know, we'll find that out.

THE COURT: You may tell us whether you know.

A Yes, I do.

Q Okay.

And how much individualized reading was Michael supposed to have received during the year '78-'79?

THE COURT: How did you know what you know, Mr. McAleer?

THE WITNESS: Jean Arin answered that question yesterday.

Q Well, let me ask you this —

MR. ROSENBERG: I will withdraw the last question, but I'm going to pursue this in a slightly different way, with your Honor's permission.

Q Were you at the Core Evaluation Meeting on June 4th?

A Yes, I was.

Q Okay.

Do you recall, at that time, being told that [2-24] Michael, in fact, received an hour's individualized reading?

A I presume I was. But I couldn't tell you definitively.

Q Have you ever seen that fact in the records?

A Yes.

Q Now, you have already testified, have you not, in the Administrative Hearing, that in your class, Michael would receive 15 minutes to 20 minutes individualized reading help?

A One-to-one. It's individualized there.

Q That's right.

A But that's not just individualized.

Q Well, now, let's be clear on this.

A Okay.

Q Is the answer to my question, which is: You testified at the Administrative Hearing that Michael would receive 15 to 20 minutes of individualized reading help, and accurate statement?

A Not to my definition of individualized.

Q Okay.

So you do not recall testifying to that at the Administrative Hearing?

A I remember stating that when I — she asked the question, to my knowledge, how long would it be that I worked specifically on an individual basis, one-to-one, with [2-25] Michael, having had six kids at the time and dividing my time of two hours a day reading, I would have had to say 15 to 20 per child, he would get just me.

Q Okay.

So you would provide him with 15 to 20 minutes individualized reading help? Just you?

A Just me.

Q Is that correct?

A For that definition, yes. There's more to individualization after that.

Q I understand.

The more to individualization in Michael's case, would that have been reading in a group setting?

A You meant —

MR. BERMAN: I don't think I understand the first two words, "more to." I would appreciate having the question rephrased or repeated.

THE COURT: I understood the witness to say there was more to individualization than the one-to-one, 15 to 20 minute reading. And I understood Mr. Rosenberg to inquire what he meant by that.

MR. BERMAN: Thank you.

MR. ROSENBERG: I think that's phrased preferably to the way I phrased it. Thank you, Mr. Berman.

[2-26] A The added dimension of individualization would be meeting directly his reading needs by specifically gearing the reading program to exactly what Michael needed. If that happened to be with another child at the time, that's what it would have been. If that meant working with another child in a specific lesson on a specific skill, because that's what he needed at the time, yes, that would have been individualization.

Developing independent material for him to work on to see how well he did learn, that would be individualization.

Q Now, the only other child who had Michael's reading problems, as you've just testified, was somebody who you at this point don't recall whether he was seven or eight? Is that correct?

A That's correct.

Q That's the other child, is it not, who would read with Michael, I take it, if you were doing it in a group or more than one-to-one basis?

A Possibly.

Q Do I take it — do I infer from the last word, "possibly," that some of the other children in the class would do group reading with Michael?

A Well, eventually that's the goal, of course.

[2-27] I'm not saying initially, but I'm saying eventually the goal is to get Michael to read and to be mainstreamed. And, of course, you want the child reading in a group situation.

Q But at the point in which he entered his class — excuse me, your class, and prior to his making the desired improvement, the only other child he would read with was this one other child?

A It's all speculation. I would say, possibly, yes; only because I don't know how his reading per se — I never read with Michael. And until I read with Michael, could I have said that definitively.

Q But notwithstanding the fact that you don't know what's definitively wrong with Michael, you could have implemented the plan?

THE COURT: He didn't say that.

A I didn't say that.

Q Perhaps —

A You were asking the question: Who would he read with?

THE COURT: Mr. McAleer, there's no question.

MR. ROSENBERG: There's no question.

May I ask the Court Reporter to read back what he did say?

THE COURT: No.

Well, you may ask, but your request would be [2-28] denied.

MR. ROSENBERG: The request will be denied.

All right.

Q Was Michael going to receive individual, one-to-one help from you in the area of spelling?

A They all do.

Q How about forming sentences, forming paragraphs and writing? Would he have received individual help on a one-to-one basis from you in that, as well?

A Definitely.

THE COURT: This is separate and apart from the one-to-one reading that you previously testified to?

THE WITNESS: Usually, when we get to that stage, that is language arts, which is another 45-minute period, later on. So that would be in addition to the reading, correct. It would be a separate time.

THE COURT: What would you anticipate to have been the total time in the course of an average day that you would have spent with Michael on a one-to-one basis? As you defined it when you talk about the 15 to 20 minutes?

THE WITNESS: The average day for Michael, just me — I'm trying to calculate each activity and how much he could have gotten by himself — I would [2-29] approximately an hour he would have gotten.

THE COURT: And that would have included, as we now know, 15 to 20 minutes on reading?

THE WITNESS: Yes.

THE COURT: And how would the remaining 40 to 45 minutes have been spent?

THE WITNESS: Okay. Five to ten minutes in spelling. In the math area, another 15 minutes. The language arts, five to 10 minutes.

THE COURT: Language arts is what?

THE WITNESS: Language arts is writing; could be penmanship; forming sentences; parts of speech, nouns, verbs, adjectives; that type of thing, basically.

The afternoon, we have social studies, another few minutes there; and, also, the behavioral activities where I would be talking just to him for another period of 10 to 15 minutes.

Q Were the children taught social studies in your class?

A Yes.

Q Would that be done on an individualized basis with Michael or in a group?

A Initially, it's done in a group. And then we individualize according to the child's needs — or not necessarily needs, but his strengths.

Q How about math? Would he be taught in an individual [2-30] setting and a group setting or just an individual or just a group?

A Initially, it would have been an individual group.

Q Excuse me?

A Initially, it would have been an individual, individual group in a — it would have been one-to-one. It would have been just him, so I can ascertain what his strengths were.

Q Okay.

Were the materials that you used in that class —

A The math class?

Q — specifically designed for dyslexic children?

A I tend to doubt it.

Q Were you going to use materials — strike that question.

For teaching social studies, were you going to use written texts of any sort?

A No, I do not.

Q Now, I believe you testified you were trained in something called the Helen Grush Method; is that correct?

A Right.

Q There is another method that has been referred to throughout the Administrative Hearing known as the Orton-Gillingham Method.

[2-31] Is the Helen Grush Method the same as or different from the Orton-Gillingham Method?

A It's similar to it.

Q It's similar to it.

And is it, in fact, a derivative of the Orton-Gillingham Method?

A I don't know.

Q Do you know which one was developed first?

A I don't know.

Q You don't know. Okay.

In the five years preceding the fall of 1979, do I understand that you had a total of 19 children in your classes?

A I'm trying to think back. I think that over those years, yes, the number of children I dealt with would have been 19.

Q Do you know how many of those children were diagnosed as having — excuse me, as being dyslexic?

A I already answered. Similar problems to Michael, there were three.

Q There were three. Okay.

You'd never met Michael prior to September of 1979, had you?

A He walked in during the Core Meeting on June 4th.

Q Other than that one meeting, you never met him?

[2-32] A No.

MR. ROSENBERG: I have no further questions, your Honor.

THE COURT: Mr. Berman, anything else?

MR. BERMAN: None, your Honor.

THE COURT: Thank you, Mr. McAleer, you're excused.

[Transcript of a portion of the trial held on May 14, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes the testimony of Dr. Marcel Kinsbourne, an expert witness called by the plaintiffs, found at Transcript Volume II, pages 2-33 to 2-108, and reproduced in the Record Appendix, Volume II, pages 2-33 to 2-108.]

[2-33] MARCEL KINSBOURNE, Sworn

Direct Examination by Mr. Berman

Please state your name, sir.

A Marcel Kinsbourne.

THE COURT: Marcel?

THE WITNESS: M-a-r-c-e-l K-i-n-s-b-o-u-r-n-e.

Q And where do you live, sir?

A Winchester, Massachusetts.

Q And what is your profession, sir?

A I'm a physician.

Q And do you have any specialization, sir?

A I do.

Q And what are these, please?

A I'm a child neurologist. And my further specialization is in the area learning disabilities. . .

THE COURT: Dr. Kinsbourne, I have trouble hearing you. Could you keep your voice up, please?

THE WITNESS: Yes.

THE COURT: What was the first speciality?

THE WITNESS: I'm a child neurologist. In other words, a pediatric neurologist. And my speciality within that field is learning disabilities and attentional difficulties.

[2-34] MR. BERMAN: You might be better heard, Dr. Kinsbourne, if you move the chair forward.

THE COURT: I'm sorry, it doesn't work terribly well, so you'll have to just shout.

MR. ROSENBERG: Could I have the last answer? I simply didn't hear it.

THE WITNESS: Learning disabilities and attention difficulties.

MR. ROSENBERG: Thank you.

Q Would you tell her Honor what your educational background is, Dr. Kinsbourne?

A I went to college in England at Oxford University, and my college there was Christ Church.

I took my B.A. in Physiology in 1952.

I then won a combined hospital scholarship which took me to Guys Hospital in London for my clinical training, which I completed in 1955.

I took training for periods of time in Internal Medicine and Surgery and Neurosurgery and then specialized in Pediatrics.

In 1958, I won a Fullbright Award, which took me to Bellevue Hospital in New York for a year of Pediatrics.

I returned to England and trained both in Pediatrics at the Great Ormond State Hospital.

[2-35] THE REPORTER: At where, please?

THE WITNESS: Great Ormond, O-r-m-o-n-d, State Hospital, and at the National Hospital at Queen's Square, and then at the Oxford University Medical School in Neurology and Pediatric Neurology.

In 1964, I had, in addition, accumulated some experience in publications in the field of Psychology, particularly as it bears on the relationship between behavior and brain functioning, both in the mature and the developing brain. And I was awarded a higher doctorate by the Faculty of Medicine at Oxford University for disortation in that field.

In 1964, I was appointed University Lecturer in Psychology at Oxford University. And I retained that position until 1967, when I moved to the United States.

I moved to Duke University in North Carolina, and there my title was Associate Professor of Neurology & Pediatrics. And my responsibility there, among others, was to be Director of the Developmental Evaluation Clinic, which is a clinic dealing with developmental disabilities.

In 1974, I moved to Toronto, where I was Professor of Pediatrics in the Division of Neurology at the University of Toronto, and also Professor [2-36] of Psychology at the University of Toronto and at the University of Waterloo.

THE REPORTER: The University of what, please?

THE WITNESS: Waterloo.

And there I ran the Learning Disabilities Clinic at the Hospital for Sick Children.

In 1980, I moved —

MR. BERMAN: Excuse me.

I'm sorry, your Honor. Both Mr. Rosenberg and I cannot hear Dr. Kinsbourne.

Dr. Kinsbourne, could you please speak louder?

THE WITNESS: I'm sorry.

Should I repeat some of what I said?

MR. BERMAN: No. No.

MR. ROSENBERG: No, I'm reading as you go along.

MR. BERMAN: But please try to keep your voice up.

THE COURT: Do we have a curriculum vitae either in evidence already or to be offered?

MR. BERMAN: We have a curriculum vitae that has been given to — as answers to interrogatories to Mr. Rosenberg.

THE COURT: Can we mark it as an exhibit in this case?

[2-37] MR. BERMAN: Yes, your Honor, I'll be glad to.

THE COURT: Why don't we mark all of the transcript of the Administrative Proceeding Exhibit 1, and all of the exhibits collectively at the Administrative Proceeding, Exhibit 2 in this proceeding, and we will mark the curriculum vitae as Exhibit 3.

MR. BERMAN: All right.

I have the problem, of course, with this case, as your Honor realizes, of the accumulation of paper. I read — I found Dr. Kinsbourne's curriculum vitae and read it over when I was preparing this case —

THE COURT: We'll mark it when you find it.

MR. BERMAN: All right.

MR. ROSENBERG: I think perhaps that Ms. Janos has a copy.

[Administrative Hearing transcript marked Plaintiffs' Exhibit No. 1 in evidence.]

[Administrative Hearing exhibits, collectively, marked Plaintiffs' Exhibit No. 2 in evidence.]

[Curriculum Vitae of Marcel Kinsbourne marked Plaintiffs' Exhibit No. 3 in evidence.]

Q I assume — I was going to go into the publications, but I see these are — there are voluminous ones. [2-38] I think there are over a hundred, as a recall, in the curriculum vitae.

I would simply ask you whether you have published any books in the area of learning disabilities specifically?

A The most recent of my five books is entitled "Children's Learning & Attention Problems" by Little, Brown in 1979, specifically in that area.

Q And have you published any other books or papers on learning disabilities?

A I have published four books relevant to the field. And of my over 200 papers, the majority are relevant in one way or another.

Q Now, Dr. Kinsbourne, were you at some point asked to undertake, to give some opinions with respect to Michael?

A I was.

Q And when was this, please?

A This was in the late fall or early winter of 1980.

Q And by whom were you asked?

A By you.

Q And, specifically, what were you asked to do?

A You asked me to review the issues relative to Michael with respect to the adequacy of the Educational Plan for 1979-1980, as well as the school's ability to [2-39] implement it and its restrictive nature.

Q And will you please tell her Honor what you did in order to form opinions?

A I first read the compendium of documents compiled by the Burlington School System. And I read the transcript of the Hearing that had taken place and the findings of the Hearing Officer.

I visited the Burlington Central School, where I met with several teachers who had knowledge of Michael, including Mr. Foley, Mrs. Arin. I talked to Gail Marsh. I also met Mr. Cavanaugh, the Psychologist. And discussed with each of them the issues relevant to the question that you asked me.

And I then visited the Pine Glen School. I reviewed the physical location of the classroom where Michael would have been taught and it's relation to other classrooms where he would have been mainstreamed and, also, it's relation to classrooms where children with other disabilities were located.

I observed Mr. McAleer teach, and I then discussed with him his teaching methods and what he would have done, specifically, with Michael. I also observed an art class to which Michael would have been mainstreamed.

Subsequent to this, I reviewed documents [2-40] from the Carroll School that you gave me. I was present when the deposition was taken of Ms. Robin Fleck of the Carroll School and I then read through the transcript of that deposition.

I asked for a copy of the Helen Grush Methodology, which I was not familiar with, and reviewed that. And I also reviewed Dr. Melvin Levine's report of last June. I referred to other literature and thought about it.

Q Have you formed an opinion as to whether or not the Individual Educational Plan prepared by the Burlington Public Schools for Michael for the 1979-1980 school year adequately addressed his needs?

A Yes.

Q Have you formed an opinion as to whether or not the Town was capable of implementing that plan successfully?

A Yes.

Q Have you formed an opinion as to whether or not it would have been the least restrictive setting in which it could be implemented?

A Yes.

Q Now, will you tell me what your opinion was with respect to the Individual Educational Plan?

A I thought that the plan did adequately meet Michael's needs.

[2-41] Q And will you tell me what your opinion was as to whether the Town could successfully implement the plan?

A I thought the Town could.

Q And would you tell me what your opinion was as to whether or not the implementation would have been in the least restrictive setting?

A Of the alternatives available, it seemed to me the least restrictive.

Q Now, will you please tell her Honor the bases for the opinions that you have just given?

A I will first address the adequacy of the plan.

I judge it to be adequate because it addresses what I take to be the two main issues in Michael's education at that time.

One issue was his difficulty in paying and maintaining attention. The other issue is difficulty in achieving fluency in reading.

Now, these were not the only difficulties but they were, in my view, the most important by far.

Now, in order to explain why I felt that, and do feel, that the provisions made or proposed were appropriate, I would have to go into and will go into the diagnosis of Michael's case, because from the diagnostic label, flow the measures that are taken to help the child.

[2-42] And, here, some terminology needs to be explained.

When children do badly in school, the reasons can be either intrinsic or extrinsic to their own development. Extrinsic reasons would be poverty, deprivation, child neglect, other stresses which cause emotional disorder. Intrinsic would be delays and failures of mental development.

Now, the first question to be asked of any child such as Michael is: Is the difficulty that he's experiencing extrinsic, environmental, stress related, emotionally related, or has it to do with the way his own intellect has developed, with the strengths and weaknesses that he, as an individual has for whatever reason.

Now, that first determination, on the record, seemed very easy to make. There was no indication anywhere, nor has anybody expressed the opinion that there was a primary emotional disorder in Michael's case. They had, of course, recognized Michael was upset. He was described as depressed, lacking self-confidence, anxious. And all of these being natural reactions secondary to the learning problem.

THE COURT: When you say no primary emotional disorder, you're saying that there was no intrinsic problem.

[2-43] THE WITNESS: Well, I was using the term intrinsic rather differently, in terms of brain based.

What I'm saying is the child didn't have a chronic anxiety state due to some early childhood trauma. It was not, in fact, a psychiatric case. But he was upset. And, therefore, he did have emotional needs, secondary to his predicament.

Now, that important distinction is relevant to the educational provisions made. If a child has a primary emotional disorder, then the classroom provisions have to address that. Of course, they cannot by themselves address it. Such a child would have intensive psychotherapy or other psychiatric treatment. In the meantime, while these hopefully work, the child's socialization, relations to others, would be the main concern in a classroom. His achievement would be a secondary concern. Although the format would be a learning format, the goals would not be the primary educational goals.

On the other hand, as I scrutinized the Educational Plan offered, I find that the goals are virtually in every case educational goals.

In other words, this is not the kind of IEP which would be written for a child with a primary emotional disorder. Of the thirteen points, two address his feelings, and do so appropriately. Self-confidence.

[2-44] The other — two of them address the attentional issues, and the other eleven address specific educational goals.

So I will now concentrate upon the different types of what I call intrinsic or brain based difficulties that may lead children to have difficulty learning to read and write.

They fall, again, into two categories.

In order to achieve anything educationally, obviously one has to understand the material and remember it. And, in fact, remembering flows from understanding. Because what is not understood will rarely be remembered.

THE COURT: I'm sorry. Start again, please.

THE WITNESS: A basic need, intellectual need to learn, clearly is to understand the material. And one cannot remember material unless it is understood.

And there are some children who are slow learners because the brain development, which is the underpinning of intellect, is slow; and these would be retarded children. That is not the issue here.

However, there are some children who although they are developing normally in most facets of intellect, for reasons that are not clear, are [2-45] developing very slowly, if at all, in certain facets. Limited areas of intellect. So they will find things hard to understand in one area, although in other areas they are as bright and quick as anyone else.

When that area of selective difficulty overlaps an academic field and thereby impairs academic performance, we call that a learning disability.

When the particular academic field is reading and writing, we call it a reading disability. So that is one kind of problem.

The other kind of problem comes first. Because, however well one is able to potentially understand anything, if one is not paying attention, one will not understand.

If a child cannot pay attention, or although beginning to pay attention, cannot sustain attention, or divides his attention between the issues and irrelevances, that child will learn slowly, particularly matters that require concentration, repetition, rehearsal, and prolonged thought.

So an attention deficit would be superimposed overlie and even mask, the other kind of problem, which I call processing problem.

THE REPORTER: What kind of problem?

THE WITNESS: Processing.

[2-46] And when a child has a substantial attentional problem, it often is very hard to determine whether underneath that, there also is a problem of comprehension because the test results can be ambiguous.

Now, if a child has a purely comprehension, processing type of problem, that child's needs are rigorously educational,

rehearsal, drill. He finds it harder, therefore, he has to spend more time doing it. Because his needs are individual, the attention would have to be individual. And then a rigorous methodology can be instituted. Whether it is fun or meaningful, even is secondary, the child is usually quite motivated to succeed.

However, when a child has an attentional problem, that kind of method is not satisfactory. Because the children with attentional problems who, incidentally, in terms of the medical amentia are nowadays called attention deficit disorder, or ADD, and in the past been called hyperactive.

Those children do not do well in monotonous circumstances. And although they wish to succeed, their motivation flags very soon unless there's something exciting going on, and something that they can intervene and activate.

So whereas a child with a limited reading [2-47] disability, which some call dyslexia, although for reasons I will state, I do not, I reject that term, can be given work to do, and will do that work, and will work independently and then will come back for more.

A child with an attention deficit disorder will find great difficulty working independently, will demand attention all the time, will keep coming back for more direct assistance, and may get locked into an interaction with the teacher, which is never ending. Where the child achieves while the teacher is there and then falls apart as soon as the teacher leaves.

So a major objective with those children is to help them not just perform, but perform independently, perform without constant support, and ultimately perform even though distracting things or people are present.

Now, in the case of Michael, the problems with his attention pervade the record. There is no observer who has not remarked on his attentional difficulty in some form of words or other. The comments are in school reports from the Burlington Schools, from the Memorial School. The record from

the Carroll School is riddled with comments about Michael's attentional difficulties. Every tester, every [2-48] specialist who has given Michael any tests, has commented in some way that Michael has trouble with attention. So have the physicians, so have the psychologist who tested his personality and emotional reactions.

The kind of words used range from "fail to pay attention," "cannot sustain attention," "mind drifts away," "doesn't maintain eye contact," "won't complete tasks," "vocalizes."

THE COURT: Is this attention deficit disorder a neurological defect?

THE WITNESS: Yes. In the sense it is brain based. It has to do with a failure of certain brain systems to develop to an adequate extent. So it's constitutional is a good way of putting it.

So, again and again, we are reminded by the record that Michael's attention tends to lapse very fast. He slips away from the task, has to be constantly brought back.

And when a child is like that, two things have to be realized: a child with attention deficit disorder, first of all, is not always the same. It doesn't mean he can never pay attention. He can, but he doesn't very often. Specifically, he will pay attention where he really is motivated, what's happening is to him dramatic and very interesting. [2-49] It is just that continually his attention lapses.

So instances can be found where he attends. But they will be very infrequent and, for practical purposes, not frequent enough.

The second point is that no one example of that behavior is diagnostic. But we look for a pattern of behavior. And in that pattern, we have other manifestations, both in the classroom and in the home. It isn't just a school problem. It is a problem of living style.

First of all, a person who has an attention problem would also be described as impulsive and hasty. Because the fact that

they stop attending is seen by others as being impulsive in making their decisions, giving their answers; and hasty because they haven't taken their time. And it is remarked of Michael that he is impulsive and hasty, even in preschool this is said, in kindergarten, that he already showed this style.

Furthermore, a person who doesn't pay attention is going to be disruptive. He will break the guidelines and the ground rules of a structured situation. He will do things that are not called for. He will attract adverse attention for behavioral reasons.

[2-50] And, again, the record had many references to Michael as a behavioral problem. I call your attention for example, to Ms. Kathryn Black's comment on Page 116 of the record that Michael has a behavior problem. And she worked with him, as we have heard, very intensively and knew him very well.

This behavior problem is not a primary emotional disorder. Rather, it flows from the child's style of incomplete attention. And then, finally, what happens very commonly, and happens occasionally in Michael's case, is aggression, because these children have very limited frustration tolerance, secondly to which they may flare up.

And, again, at times in the record, there are comments on aggressive behavior. In kindergarten, Dr. Lott in his case history puts on record that Michael has been aggressive. But this aggression isn't the burning anger of a psychopath. It is secondary to a maladaptive style of acting that I have described.

Now, with respect to handling this situation in the classroom in such a way as to enable the child to function appropriately and learn, what one has to do is both give the child a lot of attention, but only in little bits, so not to foster a dependence of the kind that I've described, which is ultimately [2-51] nonproductive.

So one sets a child on a proper course. One moves away, but one keeps an eye on the child. And at the first sign, not the

second or the third, but at the first sign of some disintegration of concentration, one darts over there, sets the child up again, and then goes off again.

And the whole thing is constrained by very clear contingencies. For children like this, it's no good saying, if you don't work well, you won't go to the circus on Saturday. The circus is now. And it is now that the consequence has to be. It doesn't have to be a big consequence, but it has to be tangible and present.

Now, the description of the program that Mr. McAleer gave yesterday is of the kind that I have in mind.

Now, the other aspect that has been called into question in this case is the presence of dyslexia.

I'd like to make a statement, first, upon the term and then discuss it in my own way.

I do not use the term dyslexia. In fact, I regard it as reprehensible to use that term. And I would like to explain why I do so.

In effect, I will refer, if I may, [2-52] your Honor, to a book by my colleague, Dr. Melvin Levine, who will be a witness subsequently, which I have with me.

THE COURT: Before you tell me why you dislike the term, what precisely does it mean?

THE WITNESS: I was tempted, also, to consult my colleague, but I think — because he does say so, but I know it myself.

A dyslexic child is a child who has a reading and spelling and writing problem, such that his accomplishments in those fields are significantly, perhaps two or more years, behind those to be expected of his age and intelligence level. It being the case, that such difficulties cannot be explained by environmental or emotional reasons or by poor teaching.

Now, these are the exclusionary definitions of dyslexia.

Further, to the diagnoses of dyslexia, one has to be able to show affirmatively what aspects of the child's mental de-

velopment, relevant to reading and writing, spelling, has, in fact, not matured at the appropriate rate. And psychological and psychoeducational are supposed to do that.

THE REPORTER: Would you repeat that?

THE WITNESS: Psychological and psychoeducational tests are supposed to do that.

[2-53] I will come back to testing in Michael's case to illustrate that point.

The problem with dyslexia is well summarized by Dr. Levine on Page 103 of his book. And if I may read the relevant words?

THE COURT: Perhaps, before you do that, you should give the Reporter the title of the book.

THE WITNESS: Yes, I will.

The book is called "A Pediatric Approach To Learning Disorders," by Dr. Melvin Levine and others.

MR. ROSENBERG: May I just have a page reference your Honor?

THE WITNESS: It says 103.

MR. ROSENBERG: 103?

THE WITNESS: Yes, it is.

MR. ROSENBERG: Thank you.

THE WITNESS: The term dyslexia will not be applied in this section.

And he goes on to say: "That the National Advisory Committee on dyslexia and the rate of reading disorders believes that the use of the term dyslexia serves no useful purpose."

Dr. Levine goes on to say: "Such a label implies a homogeneity of etiology, namely of causation, of pathophysiology of a nature of the brain disorder, [2-54] clinical manifestations, and treatment that simply does not exist among the population of children with deficient reading skills."

In other words, that is exactly why I object to dyslexia. It suggests a single medical disease with a specific treatment. It

is not and there is not. If one diagnoses dyslexia, no obvious recommendation flows from that. If one diagnoses pneumococcal pneumonia, penicillin flows from that. If one diagnoses dyslexia, the question can then be asked, so then what management program will be used, and there are many to choose from.

Now, the choice of those programs is not random, nor matter of personal preference, but is based upon something much more pertinent than the label dyslexia. Namely, the particular reason why this particular child is having trouble. Because, after all, the reading calls upon many mental skills, any one of which is vulnerable to delayed immaturities. And one then tries to test the child in a relevant way to determine what the weakness springs from in that child's case. Because that will help in determining the educational approach.

So many, if not most, dyslexias are language based. They're what I sometimes call the tip of a [2-55] language iceberg. The child, although clinically overtly having trouble with reading, may have been slow to develop language, may have trouble understanding complex sentences, even in the spoken speech field.

In fact, Orton, who was the originator of the Orton-Gillingham method of teaching, often called what is otherwise called dyslexia by some, specific or selected language disabilities, because he emphasized the language basis.

Of many cases. But then there are other cases that are quite different.

I published a paper in 1963 in which I described another subtype of dyslexia, which, in fact, I named after an Austrian neurologist named Gerstmann, G-e-r-s-t-m-a-n-n, because he had described a similar appearance in adults with brain damage.

These were children who had directional confusions. Couldn't tell right from left. When they made spelling errors, they didn't put in the wrong letters so much as they got the right letters in the wrong order.

And whereas the language based dyslexias tend not to affect mathematics until the level of about fourth grade when mathematics gets to be presented in a written story-problem form, these [2-56] Gerstmann children do have mathematical problems. Namely, they confuse the place value of the digits. By place value, I mean 54 versus 45, kind of confusion. They have trouble with arithmetic computations.

Now, I bring out this point for more than one reason. One reason is because it is a quite different kind of reason for failing to learn to read in the first, and clearly, the same problem won't deal with both.

The second reason is that as I surveyed the record, if there is any evidence for any sufferer of dyslexia, it's that. And I will comment on that point.

The record of psychological testing of Michael is voluminous, very comprehensive, and certainly gives the reader and gives me more than enough material to form my opinion.

What is overwhelmingly striking is how well he does.

There isn't a single test in the record which he does badly enough to explain his reading problem or his writing problem. Of course, he's better at some things than other, we all are. He does better at language tests than he does at certain tests called vision and auditory sequencing.

[2-57] But I would like to point out that you might see the same performance or even a less good one from a child who is reading normally.

So if you look at those tests, you wouldn't know the child had a severe reading problem, unless you look at the way he did the tests. Because as I have already mentioned, virtually every observer commented on his lack of organizing ability, his lack of planfullnes. And the tests he does less well than others are the ones that require planning, organizing, grouping of the material.

So when we find that he has some trouble with visual sequencing tests, the reason probably is, although these tests

often are failed for more than one reason, that's why I say probably, that he was unable to organize the material in a way to facilitate remembering. And that organizing problem, of course, goes back to the attention deficit, that I've already described in some detail.

So the point I want to make is that —

THE COURT: Why is that so? Why does the inability to organize necessarily bring you back to the attention deficit?

THE WITNESS: Because in order to organize, one needs to reflect, think and pay attention. One [2-58] cannot organize at the drop of a hat, unless one is already highly practiced in that particular form of organization. In order to organize novel materials, which after all test materials are, one has to think a moment or more than moment how to do it. And very typically, too, and with an attention deficit, fail or pass up an opportunity to do so.

So, in my opinion, all the manifestations that are shown in Michael's case, as well as all the test results that are there, could be accounted for by the attention deficit. That is not to say that they are. Because, were one to remove his attention deficit in some way, one could then retest and see whether problems remain. And I cannot exclude the possibility that some might.

If they did, maybe some problems in the Gerstmann area, that I mentioned earlier, could be underlying. I do not see enough in the record to justify the diagnosis of Gerstmann Syndrome as I have described it and as I understand it.

However, as I say, he may have a relative weakness there, which by itself wouldn't have caused trouble; but compounded with the attention deficit, might well be causing trouble.

Now, how then would one manage the reading [2-59] in such a child?

One wouldn't plug in the automatic treatment for dyslexia, because there is none. One would certainly try a variety of options. And, by all means, the Orton-Gillingham Method is an

option that would merit trying. It is successful with some children with reading difficulties. I would stress "some." There is no method that is successful with all of them, because they're so different. I would not expect there to be such a method.

And, in fact, the method was tried and it failed.

Now, given that the method failed, one has to analyze the situation to determine why did it fail? Where —

THE COURT: What was the method that was tried and failed?

THE WITNESS: The Orton-Gillingham Method. It was tried by —

THE COURT: When was that tried?

THE WITNESS: It was tried by Ms. Kathryn Black. She used it for a year and a half. And after initial progress, he got stuck, as the record vividly documents.

Now, what is significant here, your Honor, [2-60] is the way in which he got stuck.

The Orton-Gillingham Method is one of a family of phonic approaches. It is neither the first nor last of those. There are quite a few of them. I list some in my book. Dr. Levine lists others, and some of the same in his.

What one does is to do what educators call word attack. You sound out the constituent speech sounds, otherwise called phonemes, of a word. You practice a child on relating each speech sound to its written symbol. And one then tries to get them together into a total word sound.

And this works well for words which are regular in the language. One can learn a speech sound, letter correspondence, and apply it elsewhere.

But, of course, and as Mr. McAleer pointed out, about half the words in language are not regular. So there are limitations in the phonics approach. But it certainly is useful for establishing an initial vocabulary.

However, it is not useful if a child learns to sound out a word letter by letter and then just keeps doing that. Because one

cannot read the newspaper sounding out speech sounds. In other words, useful reading cannot be achieved exclusively by learning [2-61] to sound out speech sounds. It's a step toward useful reading, but further steps have to be taken.

Michael got stuck. He got good at sounding out the speech sounds. He was good at word attack, but he wasn't able to make that next step to acquire fluency. This is why I said, at the onset, that the challenge now was not any more the phonics aspect of it, but to turn what had been gained into fluency.

And the place at which he got arrested in his reading progress was that place.

And the reason that he is still, at least as based on the last Carroll School reports, hovering at the late second, early third grade achievement levels in key aspects of reading, still seems to be the same. He is stuck at what has been called a phonic hurdle. Somebody who just does phonics, phonics, phonics, and cannot limp [*sic*] beyond that stage.

Now, that is a difficult matter to resolve. Certainly, it is not resolved by just keeping, doing more of the same. And just to continue an approach which has not worked would not seem sensible.

What one has to do, obviously, is to try various devices for fostering fluency.

Also, in Michael's case, one has to make the task more interesting. Orton-Gillingham is very, [2-62] very boring. It is very mechanical. A dreary thing to do.

If a child is very motivated and can attend, that doesn't matter, and some kids do very well.

But for Michael, it is understandable how his attention would constantly flag. He needs an approach which is more active. He needs some personal control.

As an example, let me give you the Language Master, which Mr. McAleer mentioned as one of the devices that he was planning to use. Here, you have cards that are flashed on in a tachistoscope, t-a-c-h-i-s-t-o-s-c-o-p-e. It is a device for

briefly exposing visual material for fractions of a second. One can——

THE COURT: Subliminal approach?

THE WITNESS: No. It's hopefully, superliminal or nothing would be learned, if one wanted to know.

But certainly, vaguely, exposure. So you cannot sound out the word letter by letter if it comes on for a fraction of a second, so it, in a sense, compels the child to try to get more of an overview and, in fact, increase his sight vocabulary. Sight vocabulary, regardless of the exact number that the [2-63] child had, has been a big problem with Michael. No question about it.

Now, another —

THE COURT: What do you call this method?

THE WITNESS: The Language Master.

Now, sight vocabulary is something that is necessary for fluent reading. And, certainly, for example, for skimming, as was brought out earlier. How much is necessary depends on the passage.

But for fluent reading, one cannot stay at each word for a long period of time. It certainly deprives that reading of any fun or informational usefulness.

So the child needs to be able to intervene. With the Language Master, the child can himself trigger the exposures.

In other words, there are a variety of devices for getting the child to read quickly, use his skills. Devices such as — it sounds very simple, but it's effectively reading to the child what the child is reading at the same time the child is reading it. So a child half learns it all by heart and half, in fact, reading it.

This one, it is called the Imprest Method by some. I-m-p-r-e-s-t. I haven't heard it specifically [2-64] referred to. I'm giving it to you as an example of the kind of way that one might approach the problem of the phonic cripple.

Now, in my opinion, the type of approach that Mr. McAleer outlined to me in conversation when I visited him at the Pine Glen School and what I heard yesterday is consistent with the prospective that I take of the case and which I have explained.

So specifically with regard to the thirteen provisions of the Individual Educational Plan, the provisions that I regard as most significant are Nos. 2, 3, 5 and 6. And I would like briefly to say why I choose those, and then, after that, 12 and 13.

"To apply mastered phonetic skills to reading." That's what I've been discussing. He's mastered phonetic skills, but how can he use them fluently to read?

"To increase visual memory for sight vocabulary." Yes. Essential for learning.

"To develop oral reading fluency." Somebody who sounds out a word letter by letter can clearly not read fluently.

"To increase auditory and visual sequential memory processing skills." Sequence is the important point here. Not just to recognize the individual [2-65] symbol, but recognize the symbol as characterized by the sequence in which its constituents are. That's words.

And then the other important objectives are the attentional ones. And they are Nos. 12 and 13.

Which for some reason I'm failing to find at this time.

Ah. "To improve attention span and diminish distractibility." Which clearly relates to what I have discussed at some length.

And, "To develop positive independent work habits for task completion." This is a crucial point. He should be able to go off, do it, and finish it before being heard of again. That has been and is a cardinal problem of Michael.

So these are the reasons why I regard the Educational Plan as appropriate.

THE COURT: Why don't we take a recess before we go on to the next step.

[Recess.]

Q [By Mr. Berman.] You have given us your basis for your opinion that the plan adequately addressed Michael's needs.

I'll now ask you to go on and give us the [2-66] basis for your other opinions that the School System could successfully implement it and that the setting was the least restrictive.

THE COURT: Haven't you already given us your opinion as to the successful implementation by Mr. McAleer?

THE WITNESS: Much of that is implicit in my remarks.

THE COURT: I thought so.

THE WITNESS: Perhaps very briefly I can just supplement those.

A My visit to the Pine Glen School is really the one further reason for my feeling that the school could implement the plan, which I should mention. I did, in fact, see the class in action. I was impressed by the favorable teacher-pupil ratio. I was impressed by the fact that children were working independently and, yet, getting continual, but not constant attention. And I though this was the kind of environment in which a child with a difficulty attention deficit could do well.

I also observed that to be — possibilities for mainstreaming were rather good. The math class was right across the corridor from that class.

THE COURT: I'm sorry?

[2-67] THE WITNESS: The mathematics class was right across the corridor from Mr. McAleer's class.

As I mentioned earlier, I visited the art class. I thought the atmosphere was pleasant and informal. The kind that a child like Michael would enjoy.

I also noticed that the children who had physical disabilities, such as cerebral palsy and so on, were served on a different floor. So that did not seem to be any implication that that class was, by its physical location, singled out as being a container for different children.

But as you remarked, your Honor, most of my answer to that question are implicitly what I've already said.

A [Continuing.] The final point was the issue of least restrictive. And, again, I can be very brief.

The fact that mainstreaming was contemplated from the very beginning of that year, renders it less restrictive than a prototype in which mainstreaming is not provided for in the foreseeable future.

So I based my opinion on that fact.

Q Dr. Kinsbourne, did you ever see or examine Michael?

A No, I never did.

Q And have you an opinion as to whether your failure [2-68] to see or examine him, detracted from your ability to give the opinions that you have given?

A Not in this case, because the documentation was so excellent and comprehensive.

Q Now, I am going to direct your attention to various findings made by the Hearing Officer, which findings are in evidence.

And you have the Hearing Officer's report there?

A I do.

Q This is directing your attention to Page 8 of that report, please.

THE COURT: Where does that appear, Mr. Berman? Is that part of the tr[illegible] script?

MR. ROSENBERG: It's attached to his complaint.

MR. BERMAN: Attached to my complaint, your Honor. But let me —

MS. JANOS: Your Honor, It's also Exhibit B-13, which should be the last group of exhibits in that pile.

MR. BERMAN: Does your Honor —

THE COURT: I have it.

Q I would like to direct your attention to the second paragraph on Page 8, beginning, "Mr. McAleer testified that he had taught just three children in five years."

[2-69] With respect to the statements in that paragraph, have you an opinion as to whether or not they support the decision to remove Michael from the program that had been designed for him by the Town of Burlington?

MS. JANOS: Objection.

THE COURT: What's the objection?

MS. JANOS: He's asking the witness if the Hearing Officer's findings support her ultimate conclusion, which is a matter for your Honor to decide. He's already gone through his opinions about Michael and about the plan and the program itself. I don't think it's appropriate for him to address the Hearing Officer's specific findings and see if they are supported by the evidence in the case.

THE COURT: I didn't understand that that was the question.

I understood Mr. Berman to ask the witness's expert opinions concerning certain statements by the Hearing Examiner, such as that the child should continue with the Orton-Gillingham Method in which Mr. McAleer apparently wasn't trained.

Isn't that correct?

MR. BERMAN: That's correct, your Honor.

THE COURT: I think I know the answer.

[2-70] A I do have an opinion.

Q What is your opinion?

A I think the Hearing Officer is wrong.

Q Would you stated your basis for that opinion, please?

A First of all, there is no particular reason why a teacher who addresses problems of children with selective reading disability has to be trained in a particular method. There are many available methods. They all have good ingredients. In fact, the best teachers do not conform to any one method, but take freely from a variety of methods to fit the child's individual needs.

And I think to continue and persist in a given method doesn't make for what the Hearing Officer in that paragraph calls consistency. I think it misconstrues the meaning of consistency. That's rigidity.

The fact is that there were several ways of addressing Michael's reading needs at that time, of which the Grush Method would seem to be one.

So it's irrelevant, in my view, of whether Mr. McAleer happened to be an Orton-Gillingham practitioner or not.

I might also point out, as has in fact already been mentioned, that in its beginning the Grush Method is quite similar to the Orton-Gillingham in its phonic [2-71] approach. The importance is what comes later; namely, the way in which fluency is attempted and independent work is attempted.

Q And I would like to direct your attention to the last sentence of that paragraph and ask you your comment on any opinions you have with respect to that sentence.

THE COURT: Well, wait a minute. The objection of Ms. Janos to that question was sustained.

MR. BERMAN: Yes. Well, let me approach it differently.

Q There is a sentence — there was evidence in this case that Massachusetts General Hospital staff additionally state a need for assistance through specialists, skilled and experienced in learning disabilities.

First of all, have you an opinion as to whether Mr. McAleer was a person skilled and experienced in learning disabilities with respect to the type that this child had?

A I have an opinion.

Q What is your opinion?

A That he is and was.

Q And now I would like to direct your attention to the third paragraph on Page 8, please, Dr. Kinsbourne.

THE COURT: Same page?

MR. BERMAN: Same page, yes.

[2-72] Q Have you read that paragraph, Dr. Kinsbourne?

A I have in the past read it.

Q And I would like to ask you whether you have an opinion as to whether the conclusions stated in that paragraph justify the removal of Michael from the IEP that was prepared by the Burlington Public Schools for the year 1979-1980?

MS. JANOS: Objection.

THE COURT: Why don't you —

MS. JANOS: I think there's a number of conclusions in that paragraph.

THE COURT: — address the conclusions that you're referring to?

MR. BERMAN: All right.

Q The conclusion that I am referring to is that the peer or group situation in Mr. McAleer's class, as it would have been constituted for the year 1979-1980, was not conducive to Michael's improvement in reading skills.

A Yes, I have an opinion of that.

Q Will you please tell us what your opinion is?

A My opinion is that the Hearing Officer misunderstands the role of the peer group in the instruction of a child of this kind.

The only way I can understand what she is [2-73] writing here, and I have to summarize how I understand it, so my own remarks have a point, is that she regards learning to read as a group activity, as kind of like a team sport, where it is good to do it together.

In fact, she expresses doubts as to whether the program might not be too individualized in view of that approach.

Now, I think that's quite wrong. Learning to read is an individual matter. It is usually done in a group situation, not because a group situation facilitates learning to read, but because it's convenient for society to teach children in groups when this can be done in a practical fashion.

However, anybody learns anything better in an individualized way. One learns to ride a bike better if one is taught it individually.

Now, most of us can learn, in spite of lack of individualization, most of the things. But those of us who experience real difficulties, need individualization.

Now, the presence of the group has some merit and some uses. Certainly the point has been made and should be made that the child should be aware that he's not the only one in the world with a problem like — with a problem. It doesn't have [2-74] to be the exact same problem. Children don't make such fine distinctions, but there are also other children also, who need individualized help. The child should be aware of this.

Secondly, the child should be able to work where other children are working, other than to disturb them and be disturbed by them. It's part of the behavioral approach. It can be fostered. This is training for living in the real world where there are other people.

But in the beginning of any program, and it would be appropriate for Michael, what he learns, he learns himself. He learns in confrontation with a teacher or the aide. He learns, given the assignment, given to him by the teacher or the aide.

The other children are doing what they're given to do. Ultimately, as Mr. McAleer has said, it is a goal to be able to do that together. That is a social goal. That is not specifically a reading objective.

So the point here is that we are not, I think, looking for tightly matched children with the exact same difficulty. Which, in fact, you will never get, anyhow, because these children are much too various, for that ever to be possible to achieve. Neither in Burlington nor in the Carroll School.

[2-75] We're looking for the ability of a child to function in a small group context, which is transitional to functioning, again, in the large group, mainstream.

Q Now, there is also a statement made in that paragraph, which is in evidence: "Even if a group structure were possible, the skill variance among students might have the effect of increasing Michael's frustration."

I will ask you whether you have an opinion with respect to that statement?

A I have an opinion.

Q What is your opinion?

A The question of skilled variance is a — it's a relevant matter. It is of some importance, but not much.

Even if children at the beginning of the year are matched in their skills exactly, which is hardly possible anyhow, by the end of the year they will no longer be matched. Some would have learned much better than others.

At all times, the human being who had difficulties is exposed to the fact some others do not. You cannot protect anybody from such a reality, nor would you wish to. Of course, you would want to minimize the impact of that reality. And you do this by sensitive handling of the situation.

[2-76] But, basically, skilled variance, to my mind, is a subsidiary issue. And certainly, it shouldn't be extreme in terms of kindergarten as together with high-schoolers. But it's not, I think, a matter of cardinal concern.

Q Do you have an opinion as to whether the skill variations in Mr. McAleer's class were too great?

A I have not seen information giving me the details in which I could base such an opinion.

Q Directing your attention, Dr. Kinsbourne, to the top of Page 9.

I would like to direct your attention to the statements in that paragraph, particularly the statement that integration into a regular math class would not be an appropriate action. And she says, "at this time," I assume she means during the 1979-1980 school year.

And I'd ask whether you have an opinion with respect to that statement in evidence?

A I do.

Q What is your opinion?

A My opinion is that simple integration to the regular math class without further provision would, indeed, not be appropriate. But as I understood it, that wasn't always contemplated. [2-77] This is a matter that I discussed with Mr. McAleer at the time I visited the Pine Glen School. And he explained to me how such integration, such mainstreaming is performed. Namely, that the structure, that the reward system which he has described in detail, is carried over into these regular classes.

And he described to me the wealth of communication between him and the teachers in the regular classes relative to the children in question.

Given this continuity of structure and approach and given the fact that, relatively speaking, Michael was doing much better in mathematics than in reading, it seemed to me a reasonable thing to try to do.

Obviously, how it worked would emerge over time.

Q I'd like to direct your attention, if I may, to the fourth paragraph on Page 9.

And there's a brief paragraph, effectively expresses a certain conclusion. I'll ask you whether you have an opinion —

A I do.

Q — as to whether or not the statements made in that paragraph justify the removal of Michael from the proposed program at the Pine Glen School?

[2-78] MS. JANOS: Objection.

THE COURT: You're asking whether the shortening of the school day would be a reason not to put him into the Pine Glen School?

MR. BERMAN: That's correct.

THE COURT: You're not asking him to comment on the facts?

MR. BERMAN: Oh, no.

A I have an opinion.

Q Would you please give us your opinion?

A My opinion is that the issue is not of sufficient significance to be weighted in such decisions.

In terms of fifteen minutes, Michael has had many fifteen minutes in three years that that —

THE REPORTER: Is that sixteen or fifteen?

THE WITNESS: Fifteen. One five.

A — many fifteen-minute periods from which he has benefited little or nothing.

The important issues are the quality of the instruction received, or to be received, rather than fifteen minutes more or less.

Q Now, directing your attention to the fifth paragraph on Page 9, the paragraph entitled — numbered "1," under "Regulatory Requirements," I shall ask you whether you have an opinion as to whether placing this child [2-79] in Mr. McAleer's classroom which allegedly had children in it exceeding 36 months in chronological age during the 1979-1980 school year would have interferred with Michael's progress in that class?

A The span of three years is a rule of thumb.

It is — in itself, it really tells one very little. One would have to know what the children were like; how they were functioning.

I cannot — it is not automatically the case that if there is a span of more than three years, that the child's education would suffer. That would be totally inadequate data to draw such a conclusion.

Q Well, I shall ask you to assume, because there is evidence in the record to this effect, that the span in Mr. McAleer's classroom, the chronological age was 40 months.

MR. ROSENBERG: Your Honor, I do not believe that is what the record shows. I believe it was seven years to eleven

years. And I don't know, frankly, from that statement whether it's 40 or 48, or whether it's a young seven and an old eleven. But what I have read, it's seven to eleven years. I would be prepared to be corrected on that.

MR. BERMAN: I believe that the testimony was that the —

[2-80] THE COURT: Whose testimony?

Here?

MR. BERMAN: No. The testimony that was received by the Hearing Officer, which has been marked —

THE COURT: Why don't you just use seven to eleven?

MR. BERMAN: All right. Very good. Why don't I use seven to eleven and —

THE COURT: Where it points out, it could even be more.

MR. BERMAN: Yes.

A If I'm — I'm trying to be clear. But I've been asked about a point in principle or about Michael. At the time Michael was nine-years old. Clearly, as far as he's concerned, to have a child up to two years younger or older would make hardly any difference. Whether the rights of somebody who is age seven or age eleven are violated, is another issue, which I haven't been asked to address.

MR. BERMAN: Excuse me, your Honor. Just one moment, please.

[Pause.]

MR. BERMAN: I have no further questions for this witness, your Honor.

THE COURT: Ms. Janos, do you have any [2-81] questions of this witness?

MS. JANOS: No, I don't.

THE COURT: Mr. Rosenberg.

MR. ROSENBERG: Could I take about a two-minute break, your Honor, just to look for one thing?

THE COURT: Go ahead.

MR. ROSENBERG: Okay.

Cross-Examination by Mr. Rosenberg

Q Good morning, Dr. Kinsbourne.

How are you currently employed?

A I'm Director of the Behavioral Neurology Department at the Eunice Kennedy Shriver Center, Malden, Massachusetts.

I'm also a staff member of the Department of Neurology at the Harvard Medical School and the Mass. General Hospital, and Adjunct Professor of Psychology at Brandeis University.

Q Okay.

Is your position at the Shriver Center a full-time position?

A It is full time.

Q And what precisely does it entail?

A I am Director of a research department. I have a [2-82] staff of investigators, and we have a further staff of technicians and students. And we do research in developmental disabilities, largely.

Q Do you — in your capacity at the Shriver Center, do you diagnose children with learning disabilities?

A Yes, I do.

Q And do you do that for research purposes or for providing advice to parents and the school?

A In my capacity, I do it for research purposes.

Q Now, you have another position at the Mass. General Hospital, is that correct?

A Yes.

Q And precisely what is that?

A I am Clinical Associate in Neurology at the Mass. General Hospital.

Q Do you see individual patients in that capacity?

A Not at this time, no. I'm not doing so. Not yet.

Q Do you have a private practice in which you see individual patients?

A I have a limited private practice. I keep it — small numbers.

Q Okay.

And your position at — is it on the Harvard Medical Faculty? Are you on the Harvard Medical School Faculty?

[2-83] A Yes.

Q Precisely what is your position on the Harvard Medical School Faculty?

A I'm lecturer.

Q You're a lecturer?

A Yes.

Q Do you know Dr. Lott. Dr. Ira Lott?

A Very well.

Q Is Dr. Lott a colleague of yours at the Shriver Center?

A He is.

Q Is he colleague of yours at Mass. General?

A He is.

Q Is he also an Assistant Professor at Harvard Medical School?

A I am not aware of his titles.

Q Is he on the faculty at Harvard Medical School?

A Yes, he is.

Q Do you have respect for Dr. Lott's opinion professionally?

A Opinion about what, Mr. Rosenberg?

Q In general?

A I have general respect insofar as I know what that means.

Q Do you have general respect for his professional competence?

A Absolutely.

[2-84] Q Okay.

Do you have respect for his competence in the area of neurology?

A Certainly.

Q Do you have respect for Dr. Lott's opinions in the area of neurological problems for children?

A Certainly.

Q Do you have respect for his opinion in the area of diagnosing learning disabilities?

A I hate to use the word "disrespect," but I regard his expertise in that field as far less than in the matters that you have mentioned so far.

Q His expertise in that field is less?

A Much less.

Q Okay.

Would Dr. Lott know a hyperactive child, do you think?

A Not necessarily.

Q You don't think so?

A No, no.

Q Not necessarily?

A Not necessarily. It depends on how clear-cut the case was. It depends on many issues. The diagnosis isn't always easy.

Q Incidentally, in making that diagnosis, what steps [2-85] do you as a clinician normally take?

A The diagnosis of attention deficit disorder, hyperactivity, just like that of dyslexia, is based on behavior. It's based on what the child does and how the child acts.

So all these diagnoses are based on testimony. And the testimony of most importance comes from the school, professionals who observe the child, and the parents.

Q Just so the terminology is clear, because I want to make sure I'm using the same terminology that you are, did I understand correctly that there are two possible, I believe you used the phrase, intrinsic causes of reading problems, or learning disabilities? Is that correct?

A There is an initial classification of two types of causes, and they then subdivide further.

Q Okay.

Let's just stick with the broad subdivisions, so that I can understand.

Now, I used the term, which neither you nor apparently Dr. Levine thinks is appropriate, called dyslexia. Is that correct?

A You did.

Q Okay.

[2-86] Now, am I correct, that another way to characterize or to phrase the traits that used to be called dyslexia, shall we say, is visual processing problems?

A No, you're not correct at all.

Q Is there any phrase that you would use that would connote the same kind of characteristics as those of us who improperly use the term dyslexia?

A I have already used it.

Q And what is that, sir?

A Selective reading disability.

Q Selective reading disability?

A Is how I would — what I would use.

Q Now, the term you — the other term, the other kind of problem, I take it, you know are referring to as attention deficit; is that correct?

A Yes. This is a recent terminology, introduced by the American Psychiatric Association, which I find to be helpful.

Q When was that introduced, by the way?

A 19 — I think it was '81. It's in the Diagnostic & Statistical Manual, Version III.

Q All right.

A '80 or '81.

Q The term that used to be used was hyperactive?

[2-87] A Yes. And still is by many people.

Q In fact, you've used it as recently as May 27th, haven't you?

A Yes. I mean, I don't know what happened May 27th, but I'm sure that in conversation I did.

Q No, I mean in your report to do with Michael Panico in this case?

A May 27th?

I didn't do a report — oh, you mean last year, maybe?

Q I — well, let's see. We're not at May 27th, I believe. I mean, May 27th of 1981.

A I quite likely did, yes.

Q And you also used the term dyslexic in that report, didn't you?

A Yes.

MR. ROSENBERG: Now, your Honor, this report has been submitted as one of the — correct me if I'm wrong — it was in a supplement to the answers to the interrogatories. I want to make sure that the Court has Dr. Kinsbourne's report. And I will either offer it in evidence, or if it's already in, refer to it.

THE COURT: Well, if it's simply one of the papers in the file, it's not in evidence. [2-88] So if you want it in evidence, you should offer it.

MR. ROSENBERG: Okay. Fine.

THE COURT: Are you objecting, Mr. Berman?

MR. BERMAN: I would not object.

THE COURT: Exhibit 4, Dr. Kinsbourne's May 27th, report, 1981?

MR. ROSENBERG: That is correct.

[Report of Dr. Kinsbourne dated 5/27/81 marked Defendants' Exhibit No. 4 in evidence.]

Q Just so we're clear, this is a report that you did in connection with Michael Panico?

A Certainly.

Q Dr. Kinsbourne, so I'm perfectly clear on this, precisely whom have you interviewed in order to form your opinion about the diagnosis of Michael Panico's problems?

A My opinion on that diagnosis was not based primarily on interviewing, although, it was certainly supplemented by interviewing Ms., then, Mason, who described Michael's

behaviors to me, as she has also done in testimony, which was consistent with what I found in the record.

Q I understand that. Would you just answer my question, sir, as to who, the names of the individuals you interviewed?

A Ms. Mason.

[2-89] Q Did you interview any other person with respect to the diagnosis or your diagnosis of Michael?

A I cannot recall, at the moment, that I did. I'll tell you if I can think of any.

Q Well, let me see, Doctor, did you, so we're clear, interview either Mr. or Mrs. Panico?

A No, I didn't.

Q Did you interview Michael's kindergarten teacher, Ms. Rubin?

A No.

Q Did you interview —

THE COURT: He told us he hasn't interviewed anybody else. Why do we have to run through the list, concerning the diagnosis?

MR. ROSENBERG: Okay.

I just want to make sure that that is his testimony on this point.

Q Now, you referred to a book which you wrote. It's this book, isn't it, "Children's Learning & Attention Problems"?

A Yes.

Q That's your most recent book?

A On this topic, yes.

Q On this topic, isn't it?

What's the point of the book?

[2-90] A The book was written primarily for pediatricians, but those of other relevant people, it's a handbook, really. It is meant to be a practical guide to understanding the concepts involved. When children have what I have described today as intrinsic problems in academic skill acquisition.

Q Is it a practical guide to diagnosing their problems?

A Yes, it is.

Q And is it a practical guide to taking steps to deal with those problems once you've diagnosed them?

A It is, within the limits of the professional scope of physicians and psychologists. It is not a practical guide to specific educational steps to be taken. It stops short of remedial education.

Q Now, am I right, Dr. Kinsbourne, that there is an entire chapter in that book that is called "Diagnosis"?

A I would hope so. I would have to remind myself of the index.

Q Sure. Chapter 4. Am I correct?

A I have it here, yes.

Q Okay. Now, Dr. Kinsbourne, I would like you to refer to what has just been marked as Exhibit 4, which is your May 27th report. [2-91] And I'd like you to turn to Page 2 of that report.

And I'd like you to read to the Court, please, the last sentence just prior to the word "Findings."

A "My inquiries into these aspect of Michael's development indicate unequivocally that Michael is, in fact, suffering from hyperactivity."

Q You have no doubt that Michael was suffering from hyperactivity?

A That's my diagnosis.

Q Now, I would like you to refer to Page 3 of that same report, Exhibit 4. And I would like you to read the last sentence on Page 3 prior to the term or the phrase you have used, "Educational History."

A "Therefore, the diagnosis of dyslexia is not applicable and dyslexia does not explain Michael's problems."

Q Now, would you — excuse me, strike that question.

What does the phrase "differential diagnosis" mean?

A That is a heading under which one considers the various possible reasons for a symptom or complaint or other difficulty.

Q And in deciding whether Michael was unequivocally suffering from hyperactivity or clearly not dyslexic, [2-92] you are engaging, am I correct, in differential diagnosis.

A You are correct.

Q Now, doesn't Chapter 4 in your book, to which we have been alluding, specifically say, Dr. Kinsbourne, that careful interviewing of the parents is crucial to making a proper diagnosis?

A I'm sure it does. It certainly should.

Q So you don't have any question that your diagnosis in this case would have been aided, do you, by interviewing the Panicos?

A I had available to me interviews, the proceedings of interviews by the professionals. And, obviously, had I not seen the child or heard of the child otherwise, I couldn't possibly have made a diagnosis without that. But I had the record available.

Q Isn't it particularly true, Dr. Kinsbourne, that in making a diagnosis of hyperactivity, interviewing the parents is particularly important?

A Particularly as compared to what, Mr. Rosenberg? Would you explain the question?

Q You don't understand my question?

A There are a number of important matters. This, of course, is one of them.

Q Okay.

Are there various impulse, kind of impulsive [2-93] behavior that children engage in that do not constitute hyperactivity?

A Absolutely.

Q What are those?

A No — everything a hyperactive child does, at some time, a perfectly normal child might do as an isolated incident.

The diagnosis of hyperactivity doesn't refer to a qualitative difference in behavior between the hyperactive child and normal children, but a difference in the quantity, in the frequency in which behaviors are manifested.

So anybody is at times impulsive. Any child might, at times, be without attracting such a diagnosis.

What we're looking for, here, is a pervasive style of impulsive and inattentive behavior.

Q Now, don't you recognize in your book a category known as "Distractability & Short Attention Span," which is different from hyperactivity?

A Could you refer me to the page?

Q Sure.

A Then I will know what it is.

Q Page 217.

A Yes. I would adhere to the statements made under [2-94] the heading, "Distractability & Short Attention Span."

Q Well, why don't you read that statement into the record?

A "Attention may lapse or wander. It may lapse into inactivity in very passive and undermotivated people or into unconsciousness in cases of minor epilepsy. It may wander to the general environment, not only in hyperactive people, but also in people who are bored because they find their tasks too easy, too hard, or for some reason unacceptable, and may wander to internal thoughts or feelings in people who are anxious, obsessed or thought disordered."

Q Do I infer from that, Doctor, that one cause of distractability and short attention span can be that a task is too hard?

MR. BERMAN: Objection to the form of the question. I don't know what Mr. Rosenberg infers.

THE COURT: Well, he's asking the witness.

MR. BERMAN: He said, "Do I infer?"

MR. ROSENBERG: If you'd like me —

THE COURT: Change the question, "Can that mean?" Do you remember the question?

THE WITNESS: I do, your Honor.

A If the wandering of attention is limited to situations where the child is, in fact, doing a task which is too [2-95] hard for him, then that is a possible interpretation.

Q Now, in determining whether distractability and wandering attention is limited to those circumstances, is it not essential to speak with people who are outside of the school environment?

A The more — if one finds that the evidence one has is insufficient, one could certainly gather more evidence from other settings. That would be a useful thing to do.

THE COURT: Dr. Kinsbourne, where you talk in that book about distractability and short attention span, are you talking about a condition, which I understand you to be talking about when you talk about hyperactivity, or are you talking about particular moments in time?

THE WITNESS: In this case, your Honor, particular moments in time as distinct from a condition.

From moment to moment, children may behave in a particular way for many reasons, some of which I list.

Q Well, in differentiating between the occasional or from time to time distractability and attention span problems on the one hand, and what is called hyperactivity on the other hand, am I correct that interviewing the parent is crucial?

[2-96] A No, it's not crucial. It can often be very helpful. But if by crucial, you mean that it is impossible to do it without, then I would disagree.

Q Would you say it's essential?

A No.

Q Would you say that it's undesirable, Doctor, to base a diagnosis of hyperactivity on the comments of classroom teachers alone?

A It certainly would be undesirable to base such a diagnosis on the comment of one classroom teacher alone. One has to look for a maintained pattern of behavior with multiple witnesses.

I don't think it's crucial what the professional standing of the witnesses is.

Q In other words, Doctor, there are no factors that come into play when a teacher makes a judgment about the child's behavior that cause you to pause about basing a diagnosis on that teacher's observations?

A I did not use those words.

No, that is not what I said at all.

Q Okay.

Well, is it, Doctor, in your view, appropriate to make a diagnosis of hyperactivity, based on the observations of the teachers alone?

MR. BERMAN: I object to the question, [2-97] your Honor. I object because of the —

THE COURT: Sustained. That's not the evidence in the case, as I understand it.

MR. ROSENBERG: Okay.

Q Does Chapter 4 in your book contain an entire explanation of the methods of interviewing parents, the methods of taking a history, the methods of interviewing the child?

A In some detail, it does.

Q It does.

And would you, please, read for the record the opening paragraph of that chapter on Page 76?

A "When a child is brought in because of school failure, it is necessary to determine through testing whether or not the child really is failing. If the failure is real, the extent and elements of the failure must be determined. Whether or not the child is actually failing, it is also essential to understand family interaction patterns; how much of the child's relationships with parents and siblings contributed to or aggravated the child's failure experience. If it turns out to be no objective

academic failure, perhaps some interactions in the family created a situation where the child is mistakenly thought to be failing, to be falling below a standard the family has [2-98] established or supported. Careful interviewing on both psychological and educational testing are crucial to making a differential diagnosis in determining the nature and dimensions of the problem."

Q And in Chapter 4, when you're talking about interviewing, you're talking about interviewing the parents and the child?

A Indeed.

Q Now, Dr. Kinsbourne, you have said in your report, as I read it, that you read, "relevant documentation from the Town of Burlington."

Is that correct?

A I presume so. You could point. . .

Q All right.

A I imagine I used that phrase. It seems consistent.

Q Well, on Page 1, the second sentence.

A Okay. Right.

Q Now, Dr. Kinsbourne, did you read all of the exhibits that were introduced into the Administrative Record?

A I read the contents of this compilation.

Q Do you know what that compilation is?

A What it is in. . .

Q Perhaps you could read the title page of that compilation?

A "Michael Panico" — the sentence you want, I imagine, [2-99] is, "Documentation submitted by Burlington Public Schools."

Q Did you read the exhibits submitted by the parents?

A Is that what is called here, "Mr. Gallagher material"?

There is material —

Q There is an entire. . .

A If you could show it to me, sir, then I could tell you what I read.

Q All right.

We'll take them one by one, then.

Did you read all of these exhibits?

A I recognize many of them. I didn't read them in this format. I recognize many of them as included in here, which I have read.

For example, Dr. Lott's report, "Cortical Function" report.

I cannot guarantee that I have read every one of these.

Q Okay.

If an experienced neurologist who was experienced in diagnosing learning disabilities interviewed the Panicos and interviewed Michael, would it be your view that neurologist's opinion was entitled to greater weight than your own?

MR. BERMAN: I object to the question.

[2-100] There's no evidence.

THE COURT: Sustained.

Q Do you know —

THE COURT: You mean by Dr. Lott?

MR. ROSENBERG: Among others, your Honor.

Q Do you know Dr. Melvin Levine of Children's Hospital?

A I do.

Q Is Dr. Melvine Levine a well-recognized specialist in the field of learning disabilities and attention — attentional deficits?

A Yes. Of learning disabilities, certainly, yes.

Q Not attentional deficits?

A He places less emphasis on attentional deficits. But, still, he's very good.

Q He's very good.

Doctor, in your report, that is Exhibit 4, you predicated your finding of hyperactivity on a number of what you call "findings"; is that correct?

A I assume I used the word, again.

Q All right.

On Page 2, so there's no question.

A Yes. Okay. Subheading findings.

Q Now, one of the findings that's included in there, in your report, as I understand it, is that: "At ages one, three and five, Michael had accidents [2-101] sufficiently severe to require stitching."

Is that correct?

A Yes.

Q Does it make any difference to your diagnosis how those accidents occurred?

A Not with great specificity. One doesn't ever pin a diagnosis on any one event. And, certainly, one cannot diagnose hyperactivity based on having accidents at age one, three and five.

We're looking, here, for a pattern, which is just one small set of constituents.

Q Well, I understand it's only one of the factors you referenced? That's what you mean, it's one of the factors?

A Yes. By itself, these episodes would not cause one to pause. But they fit into a general pattern.

Q But in order to at least give them credence as one factor, do you have to know what caused them, Doctor?

A It would be, surely, of interest.

Q Do you know what caused any of those incidents?

A No. The record didn't show.

Q I'm sorry.

A The answer is no, I don't.

Q The answer is no.

Now, on Page 3, another one of the findings [2-102] on which you predicate your conclusion of hyperactivity is the following — it's in the middle of the first paragraph:

"He would often have to be pulled out of a line by children, and his behavior made it hard for him to be transported by bus."

MR. BERMAN: I respectfully object to the use of the word "by" for the word "of." It changes the meaning entirely.

MR. ROSENBERG: Oh, I beg your pardon. Did I — "transported by bus" is what I see in there.

MR. BERMAN: "Have to be pulled out by a line of children."

MR. ROSENBERG: Oh, I'm sorry. Let me read it —

Q Why don't you read it, so there's no ambiguity about what it says?

Would you read that sentence?

A Yes, sir.

"He would often have to be pulled out of a line of children, and his behavior made it hard for him to be transported by bus."

Q On how many occasions was it hard for him to be transported by bus?

A This is the proceeds of my interview with Ms. Mason. [2-103] And she told me that it happened repeatedly, but she did not tell me on exactly how many occasions.

Q Do you know whether this was a bus to and from school in the morning?

A That is what I understood.

Q Okay.

Dr. Kinsbourne, precisely when did you observe Mr. McAleer's class?

A It was in December 1980, to the best of my recollection.

Q That is a year and a quarter after the time when Michael would have entered the class?

A Yes.

Q On how many occasions did you visit Mr. McAleer's class?

A On one occasion.

Q On one occasion.

For how long were you there?

A About an hour. I can't remember exactly.

Q Less than a half a day?

A Yes.

Q Do you know how many of the children at that point in time had selective reading disorders?

A I certainly cannot tell you that now.

Q Do you know how many of the children at that time were hyperactive?

[2-104] A I cannot tell you about the diagnoses of the other children at that time.

Q Is it your opinion, Doctor, that Mr. McAleer's class would have been the appropriate class for Michael to be placed in?

A Yes.

Q I didn't quite finish my question.

A I'm sorry.

Q I was doing it in a halting fashion. I'm sorry.

Is it your opinion, Dr. Kinsbourne, that placement in Mr. McAleer's class is appropriate for Michael if the diagnosis is he is unequivocally hyperactive?

A Yes.

Q Now, if the diagnosis, in fact, is that he is — well, I will use my term — dyslexic, is placement in Mr. McAleer's class still appropriate?

A That would depend whether he also had or did not have significant attentional problems. In fact, the diagnostic labels are unimportant.

Q Okay.

A I think the question is: Is this child able to attend? How does this child behave? Whatever else you call him.

Q So that if his attentional problems stem from his [2-105] difficulty in attending to tasks, in reading for example, would that be the right class for him?

A If he had attentional problems only when engaged in a task too difficult for him, but otherwise not, then I think although he might do well in the class, I don't think Mr. McAleer would be needed for him. I think his expertise would be in excess of what that would call for.

Q And Mr. McAleer's expertise is primarily, is it not, with people whose fundamental problem is that they have significant attention deficits?

A I am not sufficiently familiar with Mr. McAleer's expertise to say what it is fundamentally. I certainly know that he has a lot of experience with such children.

Q I would appreciate your turning to Page 3 of what we have marked as Exhibit 4 of your report, Dr. Kinsbourne.

And would you read the sentence right after the phrase "transported by bus"?

A "At lunch he would throw food and eat off other children's plates."

Q And where did you obtain that information?

A From Ms. Mason.

Q From Ms. Mason?

A Yes.

[2-106] Q Did you see that reflected in any of the teacher reports?

A I cannot recall seeing any report about his behavior at lunch in the file that I reviewed.

Q Do you know whether Ms. Mason was his lunchroom teacher?

A She told me she was there a lot while he was having lunch. I didn't inquire as to who was his lunchroom teacher. I don't know that there is a lunchroom teacher.

MR. ROSENBERG: May I respectfully request about a two-minute or a five-minute recess? Would that be possible?

THE COURT: How much more do you have?

MR. ROSENBERG: I have, I think, but I do want to consult with Mr. Panico for a moment or two, about fifteen minutes at most.

THE COURT: You can have five minutes if you cut the fifteen to ten.

MR. ROSENBERG: I see. Thank you.

[Recess.]

MR. ROSENBERG: Ready, your Honor?

THE COURT: Yes.

Q Dr. Kinsbourne, have you been employed by the Town as an expert in this case?

A Yes.

THE COURT: You mean retained?

[2-107] Q Have you been retained?

A I have.

Q Have you been paid for your services?

A I have.

Q On what basis have you been paid? Hourly or?

A On an hourly basis.

Q An hourly basis?

A Yes, sir.

Q And at what hourly rate have you charged?

A At $125 an hour.

Q And do you know the total amount of your bill to date for your services?

A No, I don't have that.

Q Do you know how many hours you've spent, approximately?

A A considerable number. I really have not added those up.

Q Okay.

Has the total amount that you've been paid exceeded $3,000?

MR. BERMAN: I pray your Honor's judgment.

THE COURT: Oh, he's used as an expert. He's entitled to inquire about what the expert was paid, and it goes to credibility, I'm told.

MR. BERMAN: All right. Thank you, your Honor.

[2-108] I withdraw my objection.

A Probably, yes.

Q Have you been paid more than $4,000?

A I don't know. Probably not.

As I say, I really — I could obtain those figures, but I don't have them on me.

THE COURT: I have no doubt, Mr. Rosenberg, if I were to add up the costs of this lawsuit, they would take care of several years of private schooling, tutoring, and other things in this case.

MR. ROSENBERG: Well, your Honor. . .

THE COURT: I simply comment.

MR. ROSENBERG: Well, that assumes, your Honor, that the lawyers have been paid and are charging for their services, your Honor, an assumption which is not correct in my own case.

I have no further questions of this witness.

THE COURT: Do you have anything else?

MR. BERMAN: I have no redirect, your Honor.

THE COURT: Thank you, Dr. Kinsbourne, you're excused.

[Transcript of a portion of the trial held on May 14, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes a portion of the testimony of Mr. Robert Panico, a witness called by the Defendant Doe, found at Transcript Volume II, pages 2-109 to 2-144, and reproduced in the Record Appendix, Volume II, pages 2-109 to 2-144.]

[2-109] ROBERT A. PANICO, Sworn

Direct Examination by Mr. Rosenberg

Q Would you state your full name, sir?
A Robert A. Panico, P-a-n-i-c-o.
Q How old are you, sir?
A I am thirty-nine years old.
Q Are you married?
A Yes, I am.
Q And what is your wife's name?
A My wife's name is Rosann, R-o-s-a-n-n.
Q How many children do you have?
A I have three children.
Q Would you please state their names and ages?
A I have a daughter, Jodine, who is age fourteen. I have a son, Michael, who is age eleven. And a son, Steven, who is age nine — I'm sorry, age ten.

THE COURT: Steven is "p-h" or "v"?

THE WITNESS: "v".

[2-110] Q How are you employed, sir?
A I am a Supervisory Criminal Investigator for the Department of the Treasury, Internal Revenue Service, in Boston.
Q For how long have you been employed in that capacity?
A I have been a Supervisor for approximately ten years. I was a Special Agent for about four years prior to that. And I was a Revenue Agent for a couple years prior to that.

Q Have you attended college?

A Yes, I have.

Q Where have you gone to college?

A I attended B.U. and received a Bachelor's degree in 1960. Subsequent to that, I returned to B.U. for graduate work in Accounting. Subsequent to that, I went to Suffolk University to obtain a Master's degree in Education — excuse me, in Business Administration.

Q Have you been employed in any other capacity other than working for the Internal Revenue Service, Mr. Panico?

A Subsequent to completion of college, I took a job with the Star Market Corporation as a Management Trainee. And I stayed there approximately six months. I think I took a part-time job for a short time to carry me until I went to work for the Government. I had an appointment, and it was just an interim period.

[2-111] Q And you are the father of Michael Panico, who is involved in this case?

A Yes, I am.

Q Now, Michael attended the Memorial School; is that correct?

A Yes, it is.

Q Did he do that for the entire time he was a student enrolled in the Burlington School System?

A Yes. From Kindergarten through Grade 3.

Q Where is your house in relationship to the Memorial School?

A It's — I live on a side street, which you walk down the street maybe three- or four-hundred yards, you're in the Memorial School.

Q Was Michael ever bussed to or from school?

A No, he was not.

Q Did Michael receive some stitches when he was one-year old?

A Yes, he did.

Q What caused those stitches?

A A defective playpen. The playpen had a — it was a new playpen, it had a piece of iron sticking out, and I think it was the first day he was in it, he caught his mouth on it.

Q Did he receive some stitches when he was three-years [2-112] old?

A Yes, he did.

Q What caused those stitches?

A I was playing with my son, and I put a hat a soft hat over his head, and he fell and hit his eye on the chair.

Q Did he receive some stitches when he was five-years old?

A Yes, he did.

Q And how did those occur?

A He was playing with his brother and another child, and in my home, and he caught his mouth on the other child's belt buckle. His belt was undone and he caught his mouth on the belt buckle.

Q Mr. Panico, I'm going to show you what's been marked as Exhibit 5, Dr. Kinsbourne's report.

And I'd like you to read the sentence, that is, the third full sentence under the category "Findings."

A "At age six, he suffered concussion."

Q Has Michael ever suffered a concussion?

A Never.

Q I would like to direct your attention to May 18th, 1979. Did you attend a meeting at the Memorial School concerning your son, Michael?

[2-113] A Yes, I did.

THE COURT: May 18th?

MR. ROSENBERG: Yes.

THE COURT: Go ahead.

MR. ROSENBERG: Okay.

Q Who was present at that meeting, in addition to yourself?

A There was myself and my wife, a Gail Mason, Patricia Meade, Myra Fournier, and I believe Sally Hennessy, who was Michael's current teacher at that point in time.

Q And what took place at that meeting?

A At that meeting, we sat down and we were told that additional testing had been done on Michael. Ms. Meade and Ms. Mason told us of their tests. Told us that they found the memory problem. They were very concerned that Michael's problem is probably all related to memory.

We discussed Michael for a few more minutes, and at the meeting we were told that Michael's program the previous year had been cut in half; that Michael had regressed greatly in his reading, in his school work; that we had been told that he was making good progress when, in fact, he wan't; that Michael needed a total program —

THE COURT: You were told that you had been [2-114] told that he was making good progress but that he wasn't?

THE WITNESS: We were told at that meeting. If I might just interject one thing. When I say "that meeting," we sat down in a classroom. We talked, got his test results. We had a general — a meeting. We also talked as a group, in twos, with my wife, myself and two other teachers, my wife and myself, for instance, and Myra Fournier. In other words, we weren't sitting around the table for the entire period of time. During the meeting, and I just cannot say what exactly was said at what stage of that meeting.

THE COURT: No. I was just asking whether you were interjecting your own thoughts or whether somebody said —

THE WITNESS: No, we — I understand.

We were specifically told that Michael had not made progress and that we had been told that he was making progress.

Q And when you were told that his program was cut in half, to what were you referring?

A Well, it was specifically — what was specifically to was that Mike's reading, one-on-one with Kathryn Black, had been reduced to 30 minutes a day.

Q Now, is the Ms. Mason who was at that meeting the [2-115] Mrs. Cummings who testified yesterday?

A Yes. It is the same person.

Q Now, did Ms. Mason at that meeting ever mention to you that 40 percent of the time, Michael was acting out in the reading room?

A Never.

Q Did Ms. Mason ever mention that to you at any time?

A No. Ms. Mason had nothing but good things to say about Michael. The first time Ms. Mason mentioned it in front of me was at a hearing.

Q And when you say "at a hearing," are you speaking about the Hearing in this case?

A The Hearing in this case, yes.

Q Did Ms. Mason or Ms. Meade provide you with any more specificity about the so-called memory problem?

A No. Specifically, Ms. Meade and Ms. Mason at that time, Miss Mason, both talked to us, my wife and I, about the fact of what an unusual thing a memory problem is. Because to that point in time, they still could not determine what causes memory problems. And one of them recommended that we take him to a, I think it was a psychoneurologist. They would give us the name. They said it was a friend of theirs and maybe he could help. But memory was such an unusual thing or such a tough thing to diagnose, and they weren't [2-116] really sure what part of the brain even controlled memory. And they told us that we probably should look into his memory problem.

Q Now, was an Individual Educational Plan provided to you at that meeting?

A No plan was provided at the meeting, but the subject of a total program in a school for dyslexic youngsters was brought up.

Q Who brought that up?

A The exact person, I'm not sure of.

Q When you say it was brought up, do you recall specifically what was said about it?

A Yes, I do. It was stated that Michael has probably reached a point where he hasn't progressed; that he might now need a total program, directed toward children with learning disabilities.

I asked, naturally, what a total program was. And that's when we were told a school which specializes in dyslexia, where each teacher in every course knows the problem, knows how to deal with the problem, and where he would get continuity so that if he went from a — as Mrs. Black explained, and she did explain this part of it, that she had — he had her, and she could work with him and Michael might be fine. But to then throw Michael back into a [2-117] regular classroom after an hour with her, or after a half hour with her, was more frustrating than if he had never gone to her, because he now went in and he was thrown into a regular school with which he couldn't cope at all.

Q Now, at that meeting on May 18th, was another meeting scheduled?

A No, there was no meeting scheduled.

Q Did you attend a Core Evaluation Meeting for Michael in the spring of 1979?

A I attended — oh, in the spring. I attended two Core — three Core Evaluation Meetings. I believe one was in March, the May 18th to which you are referring and there was a June 4th meeting, also.

Q Now, after the May 18th meeting and prior to the June 4th meeting, did you receive a call, a telephone call, from Jean Arin?

A Yes, I did.

Q At what time of the day did you receive this call?

A The call had to have been after 3 o'clock in the afternoon.

Q Why did it have to be after 3 o'clock in the afternoon?

A Because the call was extremely distressing. I called my wife as a result of it. And my wife had told me that my son had just come home from school and was severely upset because he had been tested, he had [2-118] been forced to miss recess and lunch with his class, and it bothered him. And she wanted to know why they were testing him, and I told her why they were testing him, which I found out that day.

Q Where did you receive the call from Mrs. Arin?

A Where did she call from or where was I?

Q No. Where were you when the call came?

A I was in work, in Boston.

Q And what did Mrs. Arin say to you in that telephone conversation?

A Mrs. Arin told me that Michael had been undergoing psychological testing that day; that the results of the testing were — the correct words, the exact words she used, I don't — they were distressing or serious. I don't remember the exact word, but basically that there was a serious problem that had arisen, and she would like to meet with Rosann and I and the psychologist as — you know, very quickly.

I asked if we could meet that day. That's how serious she had explained, and I wanted to meet. I told her I could be there in an hour. And she said we couldn't meet because the school day was over and I — what the reason, either her or Mr. Cavanaugh had an appointment or had something else. And she said we could talk about it the next day, because I [2-119] wanted a quick appointment, and we had set the appointment for the next day.

Q And just for the record, who is Mr. Cavanaugh?

A I have been told that he is the School Psychologist.

Q Okay.

Did you, in fact, attend a meeting the next day?

A Yes, I did.

Q Concerning Michael?

A Yes, I did.

Q Now, who was present at that meeting?

A My wife and I, Jean Arin, and Richard Cavanaugh.

Q And would you please tell the Court what took place at that meeting?

A At the meeting —

THE COURT: What was the date of that meeting?

MR. ROSENBERG: This is May 25th, 1979.

A Initially, we were introduced to Dick Cavanaugh, and we were told that he had tested Michael, and we were told that he had found serious problems.

Dick Cavanaugh then told us that he found Michael to have severe emotional problems that were interfering with his learning. He told us Michael used distantiation [sic]; that Michael was anxious, [2-120] angry, fearful of death, contemplated or not — dwelled on death, things of this nature. So much so that I asked if he was suicidal or harmful to himself? He told us no, at this time.

I asked if he needed psychiatric help. And he said, not at this time, but he will if his problems aren't corrected.

He scared us, would be the best way to put it. He told us about all these serious things, these emotional problems that interfered with everything that Michael did. He couldn't concentrate because the emotional problems were so bad. He couldn't do anything in school. He couldn't attend to tasks. He couldn't do anything because he was so anxious and so depressed. And he was screwed up.

Excuse me, but that's the only way I can think of, that's what we were told.

MR. BERMAN: I object to "he scared us."

THE COURT: That may go out.

A We then — excuse me. Do you want me to continue the meeting?

Q What took place next?

A After he finished telling us about all the problems with Michael, I asked Mr. Cavanaugh if, you know, what about a reading disability, what about a learning [2-121] disability? You know, what about all the other problems?

And he told us that Michael didn't have any other problems; that Michael's sole problem was emotional. When the emotional was taken care of, Michael would be able to learn.

Jean Arin then told us that she was very concerned about Michael, and that although it's serious, something — not to worry, because Burlington had an excellent program for children with emotional problems. She told us there was a class at the Pine Glen School run by John McAleer. She told us John was an excellent teacher who worked wonders in his class with — this class for emotional children.

She told us that she was going to recommend John — I mean, placing Michael in John McAleer's class. She also told us that she would like to set up a day when we could go up and view the class and bring Michael, so that Michael would meet his teacher next year. And where it was going to be a new school, it wouldn't be so hard for Michael to go there, not knowing the teacher.

This — then we — there was general conversation about everything that had been said. I had asked how they could be so sure that Michael's problems were emotional and not, you know, a learning [2-122] based problem. I said that it would seem to me that any child who was smart, was struggling, was not learning and was having that type of a problem would have to develop emotional problems. They'd almost be a — a logical thing that you would assume that he would.

I asked what came first, the chicken or the egg. And Mr. Cavanaugh said it is an unusual — it is normal that kids with learning problems would develop emotional. But in this case, there's no question. His problems are emotional, they are not

learning, and that's what's causing his problem. And there is no question as to whether one is causing the other, but that the emotional is causing learning.

We talked about it a while longer and Dick Cavanaugh had to excuse himself, he had another engagement.

My wife and I then talked to Jean Arin. We talked at great length about John McAleer's class. She told us about a girl who was in John McAleer's class, a girl who had severe problems, who John had helped, who loved John dearly for his help. And it had gotten so bad that even though now she was able to go to her regular classes, that most subjects she couldn't break herself away from John, she still went back there for reinforcement. That he had this kind [2-123] of an effect on people; that he just worked wonders with them.

Jean Arin told us that she had been trying to get — I'm sorry. The statement here, Dr. Cavanaugh was still there.

Jean Arin told us that she had been — wanted to get Michael out of the Memorial School for over a year. But she couldn't, because that was the school that he was the closest to. She told us that the law prohibited it. She also told us that Michael was in a school where the Principal ruined children who were not achievers. He had no use for a child who could not achieve. And because of him, he wasn't getting his help, he wasn't getting the help, and it was his fault and not theirs that his program had been cut back.

She also told us that if we were ever adversaries in a proceeding, she would lie and say she never told us that. Dick Cavanaugh said he would swear to it. She told us Mike suffered from what they called the Memorial School Syndrome, and it's known all over Burlington. She stated that children in the Memorial School who were not achievers are just not educated or not given the attention they deserved.

[2-124] Mr. Cavanaugh left subsequent to this.

We then talked to Jean Arin some more about the emotional. I, again, asked Jean Arin without Mr. Cavanaugh there if Michael was suicidal or dangerous to himself or anyone else? And she said

she didn't think so at this time. But she thought that his emotional problems should be taken care of immediately in a class like John's.

She told us, just general things, along that line about what a wonderful job Mr. McAleer was doing.

I asked her about his reading, what would John do for reading? And she said he had no need for special reading; that John did teach some academics, but that Michael's problem was emotional, and once it was out of the way, that Michael would go right back, be able to learn and there'd be no problem.

I then told Jean Arin — we were now at a stage where it was something extremely serious with Michael, not just relative to learning, now, and involving maybe physical, danger problems to him, that I couldn't rely on a school test at this stage of the game. I couldn't rely on what Mr. Cavanaugh said, in light of the fact he had told us that the testing situation was not good. And I told her I [2-125] was going to want additional testing, independent testing, done by someone.

I told her I would like a complete, full Core done on Michael, with all the tests done. We then discussed which tests would be necessary, because I had told her that I was a little upset at the testing previously, because Dr. Lott had told us that Michael had been tested to death, and yet the Town of Burlington had tested him on several occasions without our knowledge. So I told her I didn't know what tests he would need. We sat down and tried to figure out what tests would be necessary.

I told her I wanted to get to Dr. Lott and we had an appointment with Dr. Lott a few days hence. Then I asked her if she would please have the psychological report in a typed form so that I could bring it to Dr. Lott. I believe it was or three days after this meeting that we had the appointment, and she said she would try, and then she told us, yes, she would have — make sure that it was written, and we could pick it up to bring to Dr. Lott.

She then recommended that maybe if Dr. Lott couldn't do it, if I wanted a completely independent of everybody, that we could probably go to Dr. Bauman at the Mass. General Hospital. She said [2-126] she would talk to Dr. Bauman. She told us Dr. Bauman was an expert. She would talk and see if Dr. Bauman could arrange the test quickly because she saw how concerned we were.

I said, fine. I told her that Dr. Lott, naturally, at the Mass. General, maybe they could do it together. If they couldn't and Dr. Lott had the time, I would prefer Dr. Lott to do the tests, and I told her I would let her know after talking to Dr. Lott.

Q Did anything else take place at the meeting on May 25th?

A No. That would have been — that was pretty much what took place.

Q Okay.

Now, following the meeting, did you obtain a copy of Dr. Cavanaugh's report?

A Yes, we did.

Q And when did you do that?

A I believe we picked up the report — it would have to have been the Monday following or the Tuesday following. I would say it would have to have been the 28th or 29th of May.

Q In any event, within three or four days?

A After the weekend, yes.

[2-127] Q What did you do with the report?

A After reading it? I read it first and, naturally — I took the report and I and my wife and Michael went to see Dr. Lott.

Q Now, had Michael been — strike that question.

Who is Dr. Lott?

A Dr. Lott, his first name is Ira, is a pediatric neuroiogist in the Mass. General Hospital. We were referred to him from Michael's pediatrician, Melvyn Levine, the Medford Melvyn Levine, at a time when Michael was experiencing severe night

trauma, headaches, and we were referred to Dr. Lott to determine what was causing the headaches and to determine what could be done about a learning disability, which Dr. Levine felt Michael had severe dyslexia. He wanted it documented through another doctor and through a neurologist at the Mass. General Hospital. And he said that if anyone can tell you, Dr. Lott can. He can take care of both things and direct you in the Mass. General which way to go.

MR. BERMAN: Move to strike that Dr. Levine said Michael had severe dyslexia.

THE COURT: Yes.

Q When had Dr. Levine referred you to Dr. Lott? The first time?

[2-128] A I'm just trying to place dates. It was around late fall, early winter of Michael's second grade year. I believe it was probably November of 1978, if that would be the second grade. Pretty — November of 1978.

Second grade, let me leave it as that. His second grade year. I'd have to see the report to know.

Q What grade was Michael in in '78-'79?

A Now, I'm getting — excuse me for just one minute.

'78-'79, Michael was in the third grade. So he was referred to Dr. Lott in November or December of 1977.

Q Okay.

On how many occasions had Michael been seen by Dr. Lott prior to May of 1979?

A I'm not certain on the number. We saw him in November or December of 1978. I would say approximately five or six occasions.

Q Was he also examined or tested by other physicians or other personnel at the Mass. General?

A At what point in time?

Q Prior to May of 1979?

A Yes. And once — he was given the complete — not the brain scan, the sleep, electroencephalogram, I [2-129] believe it's called, by someone. I think he was examined by a colleague at one time of Dr. Lott in the office who was either interning or something of that nature. And then he was examined by numerous, numerous doctors at one time when he was rushed in there through emergency.

Q Now, did you take Michael to visit Dr. Lott sometime in the period after you have gotten Mr. Cavanaugh's report and prior to the June 4th Core Meeting?

A Yes, we did. And as I said earlier, it would have had to have been the 28th or the 29th of May. It was the Monday, Tuesday, maybe even as long as the Wednesday after we had the meeting with Mrs. Arin and Mr. Cavanaugh. I believe it was the 28th, but it could have been the 27th or 29th.

Q Did you show Dr. Lott Mr. Cavanaugh's report?

A Yes, I gave him the report.

Q Did he give you an opinion regarding that report?

MR. BERMAN: I'd like that question answered yes or no, your Honor.

Q Just yes or no.

A Yes, he gave us an opinion.

Q Okay.

Did Dr. Lott make any referrals for Michael at the point of which you were in his office on [2-130] May 28th or 29th of 1979?

A Yes, he made a referral.

Q To whom?

A To Dr. Sherman Eisenthal, the Clinical Psychologist at the Mass. General Hospital, and to Gida Schonfeld, who I believe was the Director of the Learning Disorder Unit at the Mass. General Hospital.

Q And did Michael, in fact, see Dr. Eisenthal?

A Yes, he saw Dr. Eisenthal.

Q Do you know at what point in time he saw him?

A I believe the dates were June 15th and June — it was in June of that year, the 15th and the 27th. I believe it was at two separate times, once taken by me and once taken by my wife.

Q Was Michael also seen or interviewed by Gida Schonfeld?

A No, Michael himself was not seen. I was interviewed by Gida Schonfeld.

Q Now, did you attend the Core Evaluation Meeting on June 4th?

A Yes, I did.

Q Precisely, who else was in attendance?

A My wife and myself, Jean Arin, Myra Fournier, Kathryn Black, John McAleer. I believe Sally Hennessy, and that — I'm pretty sure that was it.

Q Let me go back one moment.

[2-131] The meeting you had on May 25 —

A Yes.

Q — how long did that meeting take place? I mean, over how long a period?

A The May 25th meeting started with — the meeting was at 3 o'clock. It ended probably sometime around a quarter of 5. Yes, it would have had to have been around that time. And I can be certain on that, yes. About quarter of 5.

Q Why are you certain about that?

A Because we rushed home to call Dr. Lott. Right after talking to him. We had an appointment with him and we wanted it extended so that we could sit and talk with him for an additional amount of time because of what we had heard. And we did do that. We did call him and we did get in touch with his office on the need to extent the appointment.

Q Now, the meeting on June 4th, how long was that meeting?

A Probably 45 minutes.

Q And would you please tell her Honor what took place at that meeting?

A The meeting started with Jean Arin talking, and I — because, all of you, everybody here knows each other, and the reason I have John McAleer here is because [2-132] Michael is going to be in John's class next year, and I wanted him to give a presentation on his class.

Jean Arin then proceeded to say Michael had been tested by Dick Cavanaugh and they found that he had severe emotional problems. He was depressed, he was anxious. It was interfering with his learning.

She then said that Michael had been tested by Ms. Meade and Ms. Mason, and that there was a memory problem.

And John McAleer gave a little, brief presentation of his class. The purpose of his class, which was to improve people's self-image. Things of that nature. To build up their confidence. To alleviate their fears.

And then Kathryn Black told us that Michael had not made the progress she had anticipated. In fact, in some areas he had regressed. She said that she read test results she had given Michael, and then she said: I want to make it perfectly clear to all of you, I've already explained this to Mr. and Mrs. Panico, that these tests were done not in conformity to regular testing. There was no time on it. I sat down with Michael and we broke the words down into syllables. We put long and short vowel sounds over them. So this is no indication [2-133] that Michael can read. I was testing him to see if Michael was learning the rules.

Q What else was — what else occurred at that meeting?

A My wife and I stated that we had concerns — I stated. My wife was there. I stated that I had concerns over an emotional — a plan calling for a placement in an emotional class because Dr. Lott told us that he, on the May 27th or 28th day, that he thought the report of Mr. McAleer was ridiculous. I don't — I think he used the word much stronger in that —

MR. BERMAN: I move to strike all of that.

THE COURT: As I understand it, he's telling us what he said at the meeting.

MR. BERMAN: What he said. Oh, all right. Then I move to restrict it so that it is admissible simply for what he said and not for the truth of what he stated.

THE COURT: That's all it's coming in for.

MR. ROSENBERG: That is correct.

MR. BERMAN: Thank you.

Q When you said Mr. McAleer, you did not mean Mr. McAleer's report?

A I'm sorry. Mr. Cavanaugh's report was ridiculous; that he told us that it would be a normal thing for any child with a learning disability to develop [2-134] emotional problems or to have emotional problems; and that he thought this should have been recognized by the psychologist. And that because we had concerns with it, that Dr. Lott had told us that he would send us to a clinical psychologist, which we had set up an appointment. And that I certainly couldn't make any decision on the placement for Michael in a class for emotional children, when the only things I had been told so far are that he did not have emotional problems.

And until I was convinced that he did, and until the doctors told me he did, there would be no way I could accept that kind of a plan.

I also told Jean Arin that I had been looking into the Carroll and the Landmark Schools; that the reason Michael had kept an — Michael and I had not kept an appointment with John McAleer's class was because Dr. Lott had advised us against it, telling us not to take Michael up there at this point in time and confuse him any more.

I told her that Kathryn Black had told us that John McAleer's — I'm sorry, no, I did not tell her that. I'm sorry.

Q Just confine yourself to what occurred at that meeting —

A At that meeting —

[2-135] Q — Mr. Panico, please.

A I'm sorry.

And that was pretty much that we — we expressed great concern over the plan. We questioned Mrs. Arin — my wife and I both questioned Mrs. Arin concerning what was going to be done for his reading; what was going to be done for his learning; not being able to tell time or not knowing right from left and being able to tie his shoes or remember people's names or anything else.

And Jean Arin, again, assured us that there'd be no reason for anything specific because Michael would be getting over his emotional problems and once they were gone, Michael would be able to learn and all this would just — you know.

I then asked Jean Arin if we could have the plan quickly in case anything had come up, because I had started to get familiar at that point with Chapter 766, and I knew if there was a problem, that I wanted to try to get it resolved prior to September of 19 — prior to the next school year, the fourth grade.

Q Following the June 4th meeting, when was it that you received the Individual Educational Plan at issue in this case?

[2-136] A I believe I received it in late June, June 28th, 29th. I believe it was June 28th.

Q Now, between June 4th and June 28th or 9th, did you have any further conversations with Mrs. Arin regarding Michael or the preparation of the plan?

A On June 15th, I called Jean Arin's office, asking for the plan. I had just left Dr. Eisenthal's office. I left a message, she wasn't there, she was to return my call, and I told them I would like an Educational Plan.

On June 27th, I called Jean Arin's office and demanded the plan. She wasn't in. I asked that she call me back. She called me back. I told her that I wanted the plan, I had to have it. And she said she was sorry, that it wasn't ready, that she was

all tied up, the end of the school year and things are very difficult.

And we then — we talked for a few minutes. I told her I wanted the plan because I was contemplating appealing if she was going to insist that Michael stay in John McAleer's classroom for the upcoming year. I told her that I had talked with Dr. Lott. Dr. Eisenthal had tested him. I talked to Gida Schonfeld on several occasions from the Learning Disorder Unit at the Mass. General. I had talked with Kathryn [2-137] Black. Every one of them told me this was not an appropriate placement for Michael. Michael had secondary emotional problems, did not belong in this class.

Kathryn Black — I told her Kathryn Black told me she had taught that class previously, she had been part of putting kids in that class through a Core Meeting, and that that class would destroy Michael. I think she used the words, it would kill him. It would be destructive for him.

Michael needed a total program. I told her that I got this from his neurologist, his pediatrician from the psychologist at the Mass. General, from the Learning Disorder Unit at the Mass. General, and from his teacher. Why are you insisting on this placement?

And she said: I don't agree with the doctors, and that's where I'm going to place him and I'll have the plan for you tomorrow.

MR. BERMAN: Again, your Honor, and I don't think it's really necessary, all of the statements that are hearsay —

THE COURT: Yes.

MR. BERMAN: — restricted, so that they are not admissible for the truth of anything.

Q Now, Mr. Panico, you rejected the Educational Plan [2-138] that was prepared; is that correct?

A Yes, I did.

Q Would you state clearly why you rejected that plan?

A The Educational Plan was rejected for several reasons.

The primary being, that it was a plan for an emotionally disturbed child. We were told that. I had no reason to believe otherwise. We were told that John McAleer was a teacher of children with emotional problems. John McAleer was the function of the classroom.

Doctors had advised against it, so — and psychologists and educators, and I felt I couldn't reject — I couldn't accept it when everybody who knew Mike said he didn't belong in it; when the only teacher who would make a comment about it, said he didn't belong in it; and when the only person who said he did belong there was someone who had never met my son.

Another reason I rejected the plan was that it didn't do anything to address what we now are finding out that Michael had as a problem, which was reading. We used the word dyslexia. I still do. That Michael had a dyslexic problem and a learning disability problem.

All the plan did was that it had good objectives. Most of the objectives were similar objectives that I had in a plan a year and a half [2-139] before, which had failed miserably.

A year and a half earlier, we had received a plan for Michael's reading, which had called for one-to-one tutorial, with supposedly the best LD teacher in the Burlington School System, and now this plan was being cut down to nothing to read. There was nothing in there for reading except that it said that what they would do and that it would be done with John McAleer, but nobody told us how. I didn't know what to expect. Was he going to be reading in a classroom or was he going to be receiving one-to-one tutorial? Nothing. I knew there was no one-to-one because it didn't specify such in the plan. I knew Michael couldn't function, learning to read, with six kids or seven kids or eight kids who were all different, especially children with emotional problems.

So there was nothing there for his reading, nothing spelled out. I had no idea what reading method would be used. I had no way of knowing what they were going to do with him.

There was also the school. I had watched Michael's plan get cut without our knowledge. I had seen other things happen, where we were never notified that he was tested. We were never told of several things. And now I have a plan that was unsigned. [2-140] I looked at my other plan. It was signed by everybody. I now had a plan that was unsigned except for Jean Arin. It wasn't signed by a principal, or it wasn't signed by the people who were supposed to have been at the Core, or it wasn't signed by myself or my wife or anybody who was involved with that meeting. I knew people involved at that meeting did not feel he belonged in that plan.

Another reason I rejected it. I felt that if I — having signed plans, they didn't do what they should, why should I rely on anything that's unsigned?

Prior to rejecting the plan, I contacted —

MR. BERMAN: I'm sorry, your Honor, I pray your Honor's judgment. He's not been asked anything about — he's been asked to give his reasons why he rejected it.

THE COURT: Sustained.

Q Mr. Panico, I'd like you to take a look at the actual plan that we're talking about.

MR. ROSENBERG: Does your Honor have the reference to that? It's Parents' 41.

THE COURT: All right.

Q Would you take a moment to look through the plan and explain to the Court any reasons other than those you've already as to why you rejected the plan?

[2-141] A Prior to rejecting the plan, I sat down and read it in great detail. I looked at it and I found things that were absurdities that were not my son, had nothing to do with my son, and were almost farfetched.

One in particular. And it's on Page 10 of the Educational Plan. on the performance level, what the student can do.

It says: "Michael has a sight vocabulary of at least 200 words."

At that point in time, Michael had a sight vocabulary, at tops, maybe five words. He could read his name, mom and dad. He couldn't even read the word "exit," or "men" or "women" on a bathroom. He had regressed unbelievably and he could read nothing.

That was not Michael and had nothing to do with Michael.

"He can recognize and divide multisyllabic words in words in written form."

Michael couldn't write. He couldn't spell. He had trouble with "in" and "out," as far as writing. He certainly couldn't recognize them in a written passage.

"He can use prefixes" — which goes on and on, "and suffixes," neither of which he could do.

Then it said: "Michael is able to skim [2-142] reading passages to locate details and overview ideas. He is able to understand" — I'm sorry — "and overview an idea."

Michael couldn't skim a word. A sentence as simple as "The dog ran," it might take him two or three minutes, and it might come out that the cat ran, or that the dog walked.

He could skim nothing. He couldn't read. He had no conception of words. He wouldn't even attempt it. He just couldn't do it. I mean, it's not even — it wasn't even at all possible at that point in time. It had nothing.

"Michael knows the vowel combinations, a-y, a-i, c-e, o-u, et cetera."

At that time, Michael didn't know them. If he saw them, that it was an "a" and a "y," he might call it a "b" and a "y," or a "c" and a "y."

It just wasn't Michael.

There was another thing that said, under — on Page 12 of the plan, "Support Services Provided."

And it says: "All special subject areas will be informed of Michael, Michael's particular learning style."

I didn't know what they were talking about. We were told Michael would be with John McAleer for the [2-143] entire day.

I was trying to figure who the Special Teachers were. There was nobody mentioned in the plan. I couldn't understand why it was in there.

One of the things they said the plan was based on was its prior assessments.

To us, the most key person to Michael at that point in time was Kathryn Black. She had taken an interest in him, who told us so many times how much he wanted to read, and what effort he was making and yet unable to accomplish. And she told us he didn't belong in the plan. The plan, in her words, the plan could kill him.

There was another thing that was stated, which was: "A multisensory approach to reading with much repetition and drill to compensate for the visual-memory integration problem would be helpful."

There's nothing in the plan which says how they're going to do it. They told us there was no — at the meeting, that there was no reading. And, yet, this is in the plan. They told us there was no reading problem. Strictly emotional.

In general, the plan didn't seem to be signed. It didn't reflect what I thought Michael was. It didn't tell us what they were going to do for Michael. [2-144] And it was completely opposite of the best medical, educational, and maybe parental input that I had, and I rejected it.

THE COURT: Why don't we suspend, here, until Monday.

[Transcript of a portion of the trial held on May 17, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes the remainder of the testimony of Mr. Robert Panico, a witness called by the Defendant Doe, found at Transcript Volume III, pages 3-3 to 3-85, and reproduced in the Record Appendix, Volume II, pages 3-3 to 3-85.]

[3-3] ROBERT A. PANICO, Resumed

Continued Direct Examination by Mr. Rosenberg

THE COURT: You understand that you're still under oath?

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead, Mr. Rosenberg.

MR. ROSENBERG: Thank you.

May I have Exhibit 4, please? The report of Dr. Kinsbourne, dated May 27th, 1981.

Q Mr. Panico, I'd like to direct your attention to Page 3 of Exhibit 4, please. Do you see the sentence following the phrase, "transported by bus" in the first paragraph?

A Yes.

Q Would you please read that sentence to the Court?

A "At lunch he would throw food and eat off of other children's plates."

Q Now, Mr. Panico, have you ever observed your son throwing food?

A Never.

Q Have you ever observed your son eating off of anyone's [3-4] plate?

A Never.

Q Did any teacher or other official from the Burlington School System ever tell you that Michael had either thrown food or eaten off of other children's plates?

A No, they have not.

Q Did you ever see that reported in any report that you were given?

A Never.

Q Now, later in that paragraph, there is a phrase — excuse me, a sentence beginning with the word "Consequently." Could you read that sentence to the Court, please?

A "Consequently, his attempts to make and keep friends tended to be unsuccessful. At 'Magic Circle,' no one wanted to sit next to him and he was not invited to other children's parties."

Q Did Michael have difficulty making friends?

A Absolutely not. That was probably his strong suit.

Q Okay.

Did anyone ever report to you, either teachers or any other officials in the Burlington Schools, that Michael had difficulty making friends or was not invited to other people's parties?

A Never. Michael, if anything, was almost constantly [3-5] at parties. He's always had a lot of friends. He still has friends from the Memorial School that he went to school with that he's still friendly with, and he hasn't gone to school with them for three years. Children not in the neighborhood. He's always had a lot of friends and he's had the same friends for a long period of time.

Q Did you ever see any written report from the Burlington Schools which indicated that Michael neither made friends nor was invited to children's parties?

A Never.

Q Now, I would like to direct your attention to the period of June 1979.

Would you please tell the Court your observations of Michael's ability to tell time at that point in time?

A He couldn't tell time, even to the hour. He had absolutely no conception of time.

Q Did you make any observations of Michael's ability to do —

THE COURT: Wait a minute.

He couldn't tell time or he had no conception of time?

THE WITNESS: Both, your Honor. He completely, an hour or a minute, there was no differentiating [3-6] between the two to Michael.

THE COURT: In terms of looking at the clock?

THE WITNESS: Both ways. In terms of looking at the clock or in Michael's own mind. If you said we'll do something in five minutes, or we'll do it in an hour, there was no differentiation. All he knew was it was later. He had no conception of whether it was five hours later, how it would relate to five minutes. None whatever.

Q Did you make any observations at that time about Michael's ability to do mathematics?

A Yes, I did.

Q What were those observations?

A Michael could add and subtract on his fingers. If he had a math problem in front of him, provided it were a single column, a problem like five and six, five plus six, he could do it if he could use his fingers. The same with subtraction, if it were nine, take away four, he could do it using his fingers, if somebody told him what the sign was.

Often he would subtract when he should add or add when he should subtract. He couldn't carry numbers at that stage unless someone was sitting with him to explain to him: Now, you've got nine and you're carrying the one over, put it up here. [3-7] And he could do any math using his fingers, but that was the extent of it. He had no concept of carrying or anything like that.

Q Did he multiply or divide?

A Absolutely not.

Q Did you make any observations of Michael with respect to his ability to differentiate between left and right at that point in time?

A Yes. We had observed Michael for four years trying to tell the difference between his right and his left or front and back. It was so obvious that Michael plays hockey and was a left wing, and he played for three or four years to that point in time. And he had to be the last person on the ice, because

he was a right wing and didn't know where to go. He used to wait until everyone else lined up, and then would go to his position. He had — not that he didn't know them, he just couldn't differentiate them. He knew there was a right and he knew there was a left. But he would confuse them constantly.

Q How about with respect to up and down? Did you make any observations of Michael's ability in that regard?

A Michael constantly reversed them. Michael would be talking about something upstairs for his bedroom and he would be talking about his being downstairs. [3-8] My bedroom downstairs. Or he would talk about a game that would be down in the cellar, and he would talk about it as being: We're going to play upstairs or we're going to do something up and down.

Front, back, up, down, right, left, were always reversed. It was a constant problem for Michael.

Q Now, in the spring, or more precisely, in the May to June 1979 period, Mr. Panico, did you make any observations of Michael's overall emotional state?

A Yes.

Q What were those observations?

A In the spring of '79, Michael was extremely frustrated. That would probably be the best word I could use. He was questioning his worth. He'd asked us on several instances if he was retarded. He knew he couldn't learn and he couldn't understand why. He was — depressed probably wouldn't be the correct word. I don't think he had ever gotten that far. He was down on himself. He had an extremely poor self-image. He felt he was useless. It was just a constant questioning of his worth at that point in time.

Q Did you make any observations, Mr. Panico, of Michael's overall behavior outside the school environment at that point in time?

A At that point in time, Michael started to almost [3-9] withdraw from people, from the kids. He was — again, it

goes back to his questioning of his worth. He was always wondering what was wrong with him. Why he would talk to the kids and they'd get upset with him. He'd say, when we did something yesterday, and they'd call him a liar, and he was talking about something that happened two weeks ago or three weeks ago. But everything was yesterday.

He would confuse people's names. When he'd be talking about a friend, something they did, and he'd call, talk about H.D., who was a friend, and he didn't mean it, he meant his brother. And it was coming to a point where the confusion was making Michael withdraw. He was just not sure of anything. He was completely unsure of himself to the point he didn't know whether he wanted to bother with the kids or what he wanted to do at that point in time.

Also, he was starting to get — the headaches were brutal at that point in time for him, and he was constantly with headaches. We tried medications. Constantly sick with headaches. They're probably the worst stretch at that point in time.

Q For how long a period had Michael been suffering from headaches, Mr. Panico?

A Suffering and having them. I think Michael [3-10] has probably had headaches since about five or six years old, getting progressively worse until early in 1977, I believe. The start of the second grade, in the fall of that year, they became very, very bad. They eased in the spring of his second-grade year through the summer, and early into the fall of the third-grade year, which would be '78-'79. After '79, after Christmas, early in '79, the headaches became very, very bad again. Through the end of the third grade and into part of the summer, they were at a stage where it was every day. Michael, I don't think, had a day without a headache. Vomiting, nausea constantly, laying down, always with hot towels on his head. They eased up, again, in the fall of 1979.

THE COURT: Hot towels on his head?

THE WITNESS: Yes, constantly, your Honor.

Q Did Michael have any drugs or other medication prescribed for his headaches?

A Michael has had numerous drugs. From Dr. Lott, from the first time we went to Dr. Lott on a referral from Dr. Levine — that's the Medford Dr. Levine — Michael was put on — was diagnosed with severe juvenile migraine, and he started on medications. I don't recall the name. There was one medication that he carried, maybe, for three or four months. That was [3-11] unsuccessful. We switched to another medication, which was unsuccessful. To another one, and I think he's tried numerous. They put him on numerous medications. He's taken Fiorinal and aspirin for the pain, and that's pretty regular. I carry it, Michael carries it. He carries it with him even now — I'm sorry, he doesn't carry it with him anymore.

He has been off medication for the headaches because they have eased considerably since the point in time.

Q Now, Mr. Panico, you enrolled Michael in the Carroll School in the fall of 1970; is that correct?

A Yes, it is.

Q When did you first learn about the Carroll School?

A It would have been May 18th, 1979, at a Core Meeting.

Q And how did you learn about the Carroll School?

A At the May 18th Core Meeting, which I had explained previously when they had told us about his memory, Michael wasn't making progress, et cetera, one of the teachers, and I'm not certain which, said that we should look into a total program, and one of the names of the school that came up, was the Carroll, another one was the Landmark.

Q Now, I'd like to direct your attention, Mr. Panico, [3-12] to the May-June period of the next year; that is, May-June 1980.

A Yes.

Q Michael had been at the Carroll School during that entire period?

A Yes, he had. One year.

Q Would you please give the Court your observations of Michael's ability to read and write and spell at that point in time?

MR. BERMAN: Objection, your Honor.

I don't think he's qualified.

THE COURT: I've got to check my notes.

[Pause.]

THE COURT: Why is this not relevant to the appropriate relief of subsequent years?

MR. BERMAN: Oh, I think the question is very relevant. I don't think Mr. Panico is the person who can answer it.

THE COURT: He can tell us his observations concerning his son. He cannot make any diagnoses, but he can certainly tell us what he observed; can he not?

MR. BERMAN: Well, all right. Precisely what he observed, but not in generalities, because . . .

Q Would you answer the questions with the limitations [3-13] places on it, Mr. Panico?

A In the May-June period, 1980, Michael's self-esteem had increased —

MR. BERMAN: I pray your Honor's judgment.

THE COURT: Tell us what you saw about Michael. That is, without drawing conclusions as to what it meant, tell us how he behaved and what you saw about him.

A Michael was playing with his friends again. He was happier. He was doing homework. He was reading words off of newpapers. He would read words off of trucks as we passed them, read words off of road signs. He was reading sentences haltingly, but reading them. He was able to do math without somebody telling whether it was addition or subtraction. He was able to identify the sign. He was able to carry numbers in addition. He was able to substract numbers which were uneven, et cetera.

Michael's headaches were lessened, were less than they had been in the past. Michael was able to write sentences. He wrote it phonetically, but he was able to write it. The grammar was not good, but it was written so that it could be understood. He could convey an idea in a sentence. He had learned a little bit of things other than — about the city [3-14] and his country, a little bit in geography, a little in social studies. The first time Michael had, you know, learned anything. He was excited about it.

Q Did you make any observations about Michael's ability to tell left from right, up from down, forward from backward, at this point in time, which is the May-June 1980?

A Yes. At that point, Michael was consistently able to differentiate between right and left. He could tell time to, maybe, within fifteen minutes. He could say it was 3:45, count them on the clock and say 3:45 or 4 o'clock. He couldn't look at a clock and tell you what time it was quickly, but he could figure out the time on the clock.

He had no problem with up and down. And that was the most absolute change. That one was completely squared away with him.

He now had a conception of what, though not a good one, of — you know, if you said a few hours as compared to a few minutes, Michael realized that there was a time, a time lag.

His right and left was almost a constant, but he still on occasion would confuse it.

Q Did you do homework lessons with Michael at this point in time?

[3-15] A I sat with him while he did them on many times, yes.

Q Has this been true during the entire period of that year, '79-'80?

A Through, '79-'80, and all the time subsequent while he's been at the Carroll.

Q Now, I'd like to direct your attention to the spring of the following year; that is, May-June 1981.

Had Michael been at the Carroll School during that year, as well?

A Yes, he had.

Q Okay.

And would you please describe to the Court your observations, Mr. Panico, of Michael's ability to do reading, writing and mathematics at that point in time?

A Michael, at the May-June '81 period, was able at this point, and was reading small paragraphs. He was writing sentences with a little more clarity. He was starting to be able to convey an idea in writing or to express an idea orally.

The confusing of constantly changing people's names or places was diminishing. "Yesterday," everything wasn't yesterday. He could now say last week, or last year. He would confuse it on occasion, but he would — he was now starting to become oriented in [3-16] time. He was able to tell time pretty well, just looking at a clock. He would be able to say it was five minutes of nine. He would, you know, be off on occasion; but, pretty much, he had his time down very well. He was able to — he had a good grasp of multiplication, although he had an inordinate amount of time memorizing the tables. He was devising his own system, where he would multiply the way he saw it. Three times six, he would take six, you know, twice twelve and add six. But he was able — he knew the concept, and he was able to do multiplication. He was very well — very good at this point in time with addition and subtraction. Again, you know, he would have lapses where a sign might be a confusion, but very minimally at that point in time.

Q Did you observe him adding and subtracting more than single digits?

A Yes, I did.

Q At this point in time?

A Yes, I did.

Q Now, as of the spring of 1981, Mr. Panico, did Michael continue to have headaches?

A Yes, he did. But from — if I might, from the period of about all of '80-'81, '81-'82, Michael's headaches, he will have an occasional bad headache. He has them [3-17] regularly. But nowhere — they're not crippling him now. By that, I mean they're not immobilizing him, that he can't do anything. He's learned to live with them and he's functioning very well with them. But he's had them throughout that period, but to a — they're not as severe, and to a lesser degree than he did, prior to, let's say, around December, the fall of 1979. They have gotten progressively better. They have been constant in the last year and a half or two years.

Q Now, you testified earlier that Michael had had a series of medications prescribed by — I believe you said it was Dr. Lott?

A Yes, that is correct.

Q Have any medications been prescribed for Michael's headaches in the year '80-'81?

A I am not sure exactly when it stopped. Michael has been off of medication since about October or November of 1980. In the second year at the Carroll School, he was taken off medication at that point in time for the headaches.

Q Did you make any observations, Mr. Panico, of Michael in the spring of 1981 with regard to his overall emotional state?

A Yes.

[3-18] Q And what were those?

A Michael was a much happier child at the end of '81. At the end May of '81, June of '81, he had come to a point where he accepted and would talk about his learning disability. He could kind of joke about it when he'd make a mistake. And when he'd see something upside down, if it were a picture, he'd

call it a dyslexic picture. He accepted it. He learned to accept his headaches; that he could admit to somebody that he had one.

He would tell the kids in the neighborhood that he went to a private school because he had a learning disability. That was probably the first time he had ever let anyone know, including — he wouldn't even tell his grandparents. No one was supposed to — although they knew he would never talk about it. At this point he was able to talk about it. He knew that he was struggling. He knew that he had a problem and he knew he had to do something to overcome it. And he felt he was.

He was a much happier child in '81 than he'd ever been since the first grade.

Q Now, Mr. Panico, Michael has been at the Carroll School through the present; is that correct?

A That is correct.

[3-19] Q Would you please — focusing your attention on the present time, would you please describe for the Court your observations of your son, Michael, at present, with respect to his ability, first, to read, write, spell, do mathematics?

A Michael's reading has improved, to me, immensely. Michael is able to sit down and read — it's a book called "Reading For Concepts," which is from the school. He is able to sit down and read the paragraph or paragraphs, and answer questions concerning the paragraph with — answer them correctly. He reads much better to himself or gets a much better — more out of it, more comprehension reading to himself than he does orally.

Q How do you know that?

A Because he's read to me orally and he's read to himself. He's also done the stories both ways, orally and to himself. And when he reads orally, he just does not get as much out of it as he does when he's reading to himself. He doesn't have anywhere near as much accuracy in answering the questions.

MR. BERMAN: Move to strike that.

THE COURT: It's an observation.

MR. BERMAN: Yes. I don't think he's — but I don't think this witness is in a position to [3-20] make that kind of statement.

THE COURT: It's an observation, Mr. Berman. He says that the child has read to him, and explained his comprehension. He has also read to himself, and explained more comprehension.

MR. BERMAN: Well, all right.

THE WITNESS: If I might, there's answers at the end of these — questions at the end of these stories. And both ways, I —

THE COURT: I understand.

Q Have you made any observations of Michael's ability to spell right at the present time?

A Michael's spelling is pretty good at the present time. When I — pretty good, it's pretty good for Michael. Certain words are spelled phonetically, and certain words like "when," will be spelled on many occasions, if he's rushing, w-e-n.

But most words which can be sound out, Michael can spell fairly well. A lot of learned words — or certainly not — "learned" isn't the right thing. Words with the long "i" or an "e" on the end, if know what he's doing, Michael can spell them.

Michael can write and has written some excellent — when I say "excellent," excellent to me.

[3-21] Q Have you read his papers?

A Yes, I have. He's written stories for school, which he's brought home. He's able to put thoughts down on paper, for the first time. Actually, a concept or an idea. It might be simple, but he's able to write about it and put it down on paper and write a couple of paragraphs about it.

Q Have you observed Michael doing any mathematics work?

A Yes, I have. Michael has been doing fractions. He, naturally, continues to do the addition and subtraction. He does it very well. He's done fractions. He's done word problems. Simple word problems. He's now able to — reading the word problem, he still has trouble with them. But this is the first time Michael's ever been able to do math out of a word problem. He's always had a lot of trouble with abstracts. Unless it was just concrete, something in front of him was concrete, he's now able to read or have it read to him and then able to do the problem and know that it should be addition or it should be multiplication, things of that nature.

Q Does Michael do division?

A Yes. Yes, he does.

Q Have you observed him doing long division?

A He's done short and long division, yes.

[3-22] Q Have you observed him doing multiplication?

A Yes, I have.

Q Does Michael still, at this point in time — let me rephrase that.

Have you made any observations of Michael with respect to his directional abilities?

A His directional abilities right now are, I would say he's 100 percent accurate.

THE COURT: You mean, left, right?

THE WITNESS: Left, right, up and down.

Directional — even north and south at this point. He's learned things of that nature. He's consistent with his directional now.

Q Mr. Panico, have you made any observations of how Michael's overall emotional status at this point in time?

A Michael is happy. He is not the least bit frustrated. He's eager. He's extremely eager to learn, where Michael will now sit down on his own and read a book, take a book out of the library. It's going to take him an inordinate amount of time to

read it, a very simple book, but he does it on his own, not a part of homework, and not as part of something I give him to do. He'll take it, he'll go with his sister to the library and he'll take out a simple book. He's [3-23] happy. He feels challenged. He now realizes, for the first time, that he really can learn things, he's learned things, he knows things about places, about things, history, geography, which he's learned, and it's giving him confidence, where he now feels that there's nothing wrong with him. He now feels that he has a chance to learn. He knows he has to struggle. We talk, and we talk about it all the time.

And he'll talk about it. He'll say: I know it's hard. I know I'm going to have a hard time doing it, but I can do it. He now has a real drive to accomplish and to learn.

MR. ROSENBERG: I have no further questions, your Honor.

THE COURT: Mr. Berman.

Do you have any questions, Ms. Janos?

MS. JANOS: No.

THE COURT: Mr. Berman.

MR. BERMAN: Thank you.

Your Honor, before I begin my questioning of this witness, I'm going to ask the Court to take judicial notice of Paper 131 in this case. I'm not interested so much in the paper itself, as in the letters that are attached to that paper, which are letters from Mr. Gallagher to me and me to Mr. Gallagher [3-24] with respect to a review.

THE COURT: Wait a minute.

These are papers — the 131 refers to the docket numbers in this case?

MR. BERMAN: That's right. It is the docket number of the paper as it will be reflected on the docket number.

I also, I think, perhaps — your Honor asked for Dr. Kinsbourne's curriculum vitae. I believe it is part of the papers filed in this Court, but I have one in —

THE CLERK: It's in evidence.

MR. ROSENBERG: It's Exhibit —

THE COURT: It's now in evidence.

THE CLERK: It's in evidence. It's Exhibit 3.

MR. BERMAN: Thank you.

Finally, there was a question with respect to a Rule 34 notice and the response thereto, which I asked the Court to notice. I note the Rule 34 notice and the response of the Defendant, Department of Education, thereto, are, indeed, apparently filed with the Court, and they are part of the record appendix on appeal. I have not been able to find a docket number among our papers corresponding to them.

[3-25] THE COURT: Do you know when it was filed?

MR. BERMAN: Yes, I do.

The Rule 34 notice was filed on March 29th, 1980. And the response was dated September 2nd, 1980.

THE COURT: March 29, 1980?

MR. BERMAN: Yes.

THE COURT: It's not even on the docket.

MR. BERMAN: I know. I can't find a docket equivalency for it. And yet I do know, I know it's docketed because I have a docketed sheet.

THE COURT: When was the response?

MR. BERMAN: The response is dated September 2nd, 1980. And for that, I — again, it was duly served and filed, but I don't have a docket entry to reflect it.

THE COURT: Why don't we mark them as exhibits? Offer them as exhibits. That way we'll put them into the papers, at least as of now.

Do you have copies of them? Because if they're not docketed, I'm not likely to have copies of them in my file.

MR. BERMAN: Would it be all right, your Honor, if I simply tore them out of the record appendix and gave the Court the record appendix?

THE COURT: Well, rather than tearing it [3-26] up, why don't you make xeroxes of them and file them later?

MR. BERMAN: All right. Good enough.

THE COURT: We'll mark them as Exhibits 5 and 6.

MS. JANOS: May Mr. Berman describe what they are, please, your Honor?

MR. BERMAN: Yes, certainly.

THE COURT: Does the copy you have, show the Clerk's stamp on them as having been received?

MR. BERMAN: Yes.

THE COURT: The Clerk of the District Court?

MR. BERMAN: Yes.

MR. ROSENBERG: Your Honor, I just want to make sure I understand. Is Exhibit 5 —

THE COURT: Exhibit 5 would be the request for production of documents under Rule 34, is it?

MR. BERMAN: Yes.

MR. ROSENBERG: Addressed to the State?

MR. BERMAN: Addressed to the State, yes.

MR. ROSENBERG: That's Exhibit 5, correct?

MR. BERMAN: And the response —

THE COURT: So it's the Town's request to the State, correct?

MR. BERMAN: That's correct.

[3-27] MS. JANOS: Could Mr. Berman read what the request specifically relates to, please?

THE COURT: Well, wait a minute.

THE CLERK: And 6 is the response?

THE COURT: 6 is the response.

Are you offering the entire document or only portions of it?

MR. BERMAN: The entire document. It's a very short document.

And the response is equally short.

THE COURT: So the request will be Exhibit 5, and Exhibit 6 is the State's response?

MR. BERMAN: That's correct.

THE COURT: All right.

[Request for production of documents marked Plaintiffs' Exhibit No. 5 in evidence.]

[Response to request for production of documents marked Plaintiffs' Exhibit No. 6 in evidence.]

THE COURT: Now, you want to read them into the record?

MR. BERMAN: If your Honor wishes, I'll be more than glad to.

THE COURT: I don't wish.

You wish.

[3-28] MS. JANOS: I would like to, your Honor. I think it's irrelevant. I think what that notice to produce would be the Department of Education to produce all notices to the Town in terms of the issues that were going to be raised at the Administrative Hearing. Something which I think you have made a determination is not relevant to these proceedings.

I don't think either the notice to produce or the State Defendant's response is relevant to the issues here at this hearing.

MR. BERMAN: It would, at the very least, be relevant to the question of why certain evidence wasn't offered at the —

THE COURT: Oh, I'll take it, if necessary, de bene.

So why don't you — do you insist on it being read?

MS. JANOS: No. That's fine.

THE COURT: All right.

When you get the xerox copies, please give them to the Clerk so they can be marked.

MR. BERMAN: Thank you.

MR. ROSENBERG: Your Honor, may I understand, is there another exhibit which had something to do with Paper No. 131?

[3-29] MR. BERMAN: Yes.

MR. ROSENBERG: I didn't understand that.

MR. BERMAN: Yes. I'm simply asking the Court to take judicial notice of Paper 131.

THE COURT: All right.

Now, do you have any questions of the witness?

MR. BERMAN: I do, your Honor.

Cross-Examination by Mr. Berman

Q Have you ever been a witness in a court prior to today?

A Yes.

Q How many times, Mr. Panico?

A Numerous times. I'm not certain of the number. Ten, fifteen, maybe twenty.

Q And when did you first meet Jean Arin, please?

A The first — would you like a differentiation between meeting her personally or orally on the phone?

Q All right.

When did you first speak to her on the telephone?

A It was around June 3rd, 1977, I believe it was, right near the end of grade one, provided I've got the years correct. Yes. It would have been around June 3rd, [3-30] 1977.

Q And when did you first meet her in person?

A I would think a couple of weeks later at a Core Meeting, at the end of grade one. I believe that was the first time I actually met her.

Q And between that date and May 25th, 1977, about how many times had you met Jean Arin?

A I had never met her prior to May 25th, 1977.

Q I'm sorry. May 25th, 1979, please.

A How many times did I talk to Jean Arin or how many times did I talk to her personally?

Q How many times had you met her personally in that period?

THE COURT: From 1977 to 1979?

MR. BERMAN: That's correct.

A Probably a half a dozen times.

Q And you had spoken with her on the phone many more times; isn't that correct?

A Yes, I have.

Q And you had told Mrs. Arin what you did for a living; isn't that correct?

A I don't think I ever told Mrs. Arin what I did, at all. I think I told the — I told the Social Worker who came to the home. I don't believe I ever told Mrs. Arin what I did for a living. We might have [3-31] discussed — I honestly don't — I don't believe — I had no reason to.

Q You will agree with me that you had told representatives of the Town of Burlington that you were a Senior Criminal Investigator for the Internal Revenue Service; is that correct?

A Not to my knowledge, no.

Q Did you ever tell that to the Social Worker when the home assessment was made?

A I believe I must have, yes.

Q All right.

Now, on March 24th, 1979, Michael came home from school visibly upset; is that correct?

A I was not there. That's what my wife told me on the phone, yes.

Q Your wife called you and told you that Michael had come home very upset?

A No. I called my wife and she told me that Mike had just come home, not very upset, but he was upset. Yes, he was upset.

THE COURT: Did you say March 24th?

MR. BERMAN: May 24th. May 24th, it should be. I said March 24th, but it should be May 24th.

THE WITNESS: And I did answer for May 24th, your Honor.

[3-32] Q Did you speak to Mrs. Arin after you spoke to your wife or before you spoke to your wife?

A Before I spoke to my wife.

Q Did you speak to her again, afterwards?

A No, I did not.

Q As a matter of fact, when you spoke to Mrs. Arin, you demanded that she meet with you that day; isn't that correct?

A I didn't demand. I asked her if we could meet that day because of the severity that she had explained to me of the problem.

Q And did you express some displeasure to her when she said she couldn't meet with you that day, sir?

A I don't think so. I probably said — I might have. That, I don't know. I don't see why I would have. But I could have, yes. I could have been upset at the time. I don't know.

Q Well, as a matter of fact, when you came home that evening, was Michael still upset?

A In a manner of speaking, how I'm using the word, he wasn't very upset. Yes, he was upset. He told me about it. So I would say he was — that he had missed recess or lunch with his friends and he had to go into kindergarten or the first grade, I forget which, but he had to go with the little kids.

[3-33] Q As a matter of fact, Mr. Panico, from early in the spring of 1979 onwards, Michael was continually exhibiting emotional behavior; isn't that correct?

A What you're talking on emotional behavior: When he's happy, he's emotional; and when he's sad, he's emotional.

If you could define it, I could probably answer your question.

Q Well —

A Michael had — excuse me, if I might. Mike —

THE COURT: Wait a minute. There is no question at the moment, Mr. Panico.

Q Directing your attention, first of all, to — starting in April of 1979 or a little earlier, did Michael indicate in the morning that he didn't want to go to school?

A You mean, emotional that way? Absolutely.

Q Did he start crying about it in the morning?

A Yes, he did.

Q Did he start developing bad migraine headaches?

A Absolutely.

Q Did he start vomiting?

A Yes.

Q Did he regularly wake up during the night, on a regular basis, crying?

A I believe at that point in time, on a regular basis, he did, yes, and it wasn't a one-night thing. Yes, [3-34] he did.

Q Did he mumble and ramble incoherently?

A I don't think at that time he did. He was having — he was waking. He was having nightmares. But I don't think at that stage in time he was — I think that was a year or so earlier, in the second-grade year, when he was having those problems when he couldn't be awakened. If that's what you mean? On that, I'm not quite certain.

Q I direct your attention, if I may, to Page 31 of the transcript of the Hearing before the Hearing Officer.

I'm going to ask you if you will read the question, the first question that appears on that page, sir?

A "All night" —

THE COURT: Does this purport to be a transcript of this witness's testimony —

MR. BERMAN: Yes, your Honor.

THE COURT: — before the Hearing Examiner?

MR. BERMAN: Yes, your Honor.

A "Question: All right.

"Now, I invite your attention to May of 1979. Did you and your wife become concerned about Michael?"

Q And would you read your answer, please?

[3-35] A "Yes. In May of 1979, probably started April or maybe even a little earlier. I don't know. Michael started regressing. His reading, when he would read with us and he tried to read a word, it seemed a little worse than it had been. I think it was back where it was sometime in the first grade. He couldn't read. He wouldn't read. He didn't want to go to school. He used to wake up in the morning and cry about not going to school. He started to develop — he started developing bad headaches again. When I say 'bad,' I mean he has — he has migraines, but they run bad. He had very, very bad headaches, again, with vomiting. He started waking up, now, during the night on a regular basis, crying. He would come into our bed. Something that Mike has never done since he was a baby. He would cry in the night and just mumble and ramble incoherently. We became very concerned about him at this point in time."

Q Thank you. Thank you, Mr. Panico.

As a matter of fact, Mr. Panico, when you went to the meeting with Mrs. Arin and Mr. Cavanaugh on May 25th, 1979, you were of the opinion that Michael had a severe emotional problem, weren't you?

A No, I was not.

Q It's not your opinion at the time?

[3-36] A Not that he had a severe emotional problem.

Q Did you consider that he had any emotional problem?

A Yes. I felt that Michael had some emotional problems at that point in time. Would be — I might use the word "emotional" to cover a wide range of areas. Again, it would depend on how you're using emotional.

Q In your opinion, you had a child that was exhibiting certain behavior, you yourself testified to at the Hearing; is that correct?

A Yes, it is.

Q And had you testified, now that you've had a chance to read your testimony, correctly at that hearing?

A I read that testimony, yes.

Q And was what you said true?

A It was true, yes, when I said it. I said, now, I don't recall if he had done it at that point in time. At that time, evidently, I did recall. And it seems as though Michael did ramble and mumble in bed with us. Yes.

Q And, as a matter of fact, Mr. Panico, wouldn't you agree that a child who was exhibiting the kind of behavior that you testified to today and testified to on September 10, 1979, was in fact a child who had a severe emotional problem?

A No, I would not.

[3-37] Q You wouldn't.

Isn't it a fact, Mr. Panico, that when you went to the meeting with Jean Arin and Richard Cavanaugh, you were the person who repeatedly referred to Michael's emotional problems?

A I certainly used the word, but I was talking to a psychologist. And if I said, I said: Does Michael have emotional problems? How severe are his emotional problems? What are his emotional problems?

I certainly didn't make a diagnosis that Michael had a severe emotional problem.

Q I'm not asking you, sir, whether you made a diagnosis.

THE COURT: I think he's answered your questions.

MR. BERMAN: Thank you.

Q Now, when you went to this meeting, sir, with Mr. Cavanaugh and Mrs. Arin, did Mr. Cavanaugh appear to you to be reading from a paper when he spoke to you?

A No, he wasn't reading from a paper. If anything, he might have had notes. I don't recall. But he absolutely was not reading. In other words, he wasn't reading a report to us at all. It was a conversation.

Q And you never recalled, in the course of his discussions [3-38] with you, he read from his notes?

A I said he might have had notes which he referred to. He absolutely did not read from them.

Q Did you make any notes, sir, yourself, of your meeting with Mrs. Arin and Mr. Cavanaugh on May 25th?

A Yes, I did. I made notes while we were talking.

Q Did you keep those notes?

A I did.

Q Do you have them today?

A I don't have them with me. No.

Q Was Mrs. Panico present?

A Yes, she was.

Q The entire time of the May 25th meeting?

A Yes, she was.

Q And you definitely recall, sir, that at that May 25th meeting, Mrs. Arin said to you and Mr. Cavanaugh said to you, in the presence of your wife, that this child had been ruined by Memorial School, hurt by Mr. Barows, but that if she had to say it in court, she would testify falsely?

A I can tell you what her exact words were, if you'd like them?

Q Give them to us, please, sir.

A Mrs. Arin, said that she was going to tell us something about the Memorial School and Mike's being there. [3-39] And then she said, "If we ever become adversaries, sitting across the table, I'll deny I ever said it."

And then Mr. Cavanaugh said, "I will swear to it."

Q On August 1st, 1979, you made an agreement to enroll Michael in the Carroll School; is that right?

A I can't — I can't answer that without a little bit of clarification because, although I sent them a check for $200, I talked to Allan Forsythe at the school, explaining my financial situation at the time, telling him I did not have the money that they wanted at that point in time. It would entail a loan. Could I send him $200, I believe it was $200, and if Michael was going to that school, and I would make a decision before September, I would send the money they need. I would get the loan. And if not, then I would understand the $200 would be gone.

But I would say, yes, I enrolled him at that point in time.

Q Did you sign a contract?

A I did sign one. I don't know if it was August 1st.

Q Do you remember that you had a conversation with Mr. Michael on about August 1st, 1979?

A Yes, I had a conversation with Mr. Michael, in or around that period of time.

[3-40] THE COURT: Who is Mr. Michael?

MR. BERMAN: The Superintendent of Schools.

THE COURT: He was a witness?

MR. BERMAN: Yes.

Q And didn't you, as a matter of fact, tell Mr. Michael in that conversation that you had made a decision to enroll Michael in the Carroll School?

A Absolutely not. I'm emphatic on that point.

I told Mr. Michael that I was contemplating enrolling Michael, my Michael. I asked for a meeting so we could discuss it, because I explained my financial situation. I wanted the matter resolved prior to having to make a financial commitment. I never told him that we had enrolled Michael in the school. I might have told him we were thinking about it, but I told him I wanted the issue resolved so that I would have a decision prior to September, when I had to make a decision as to whether or not to outlay that money to send my son to school.

Q Well, as a matter of fact, didn't Mr. Michael tell you in that phone conversation that if you enrolled your son in the Carroll School, you would pay for it?

A Not at all. Mr. Michael told me that if I made a decision, the decision was mine. If I put Michael [3-41] in the Carroll School, I would have to pay for it, but he assured me: If we're going to a hearing and you win, the Town will abide by the hearing and we will pay for the education, and you will be reimbursed.

Q Did you testify to your conversation with Mr. Michael before the Hearing Officer?

A I'm certain I did.

THE COURT: Are you offering this to impeach the witness or for the truth of what the Town intended to do or said it intended to do?

MR. BERMAN: I'm offering it for both, your Honor, because I'm going to, when I dig into it, show that the witness testified to his conversation with Mr. Michael on August 1st, of 1979. And I'm prepared to show that in that conversation, all he had Mr. Michael say to him was that if you take the child out of — put your child in the Carroll School, you will pay for it.

THE COURT: Well, how can that bind Mr. Panico to agree to pay forever, even though he may have had legal rights to change that? Namely, this lawsuit.

MR. BERMAN: I'm not suggesting that it binds Mr. Panico forever.

THE COURT: Or get the Town off the hook?

[3-42] MR. BERMAN: I am suggesting — yes.

THE COURT: If the Town is on the hook?

MR. BERMAN: Yes. I am suggesting, however, that under the construction given to Title 20 of the United States Code, Section 1415(e)(3) —

THE COURT: In Stemple?

MR. BERMAN: Yes. In Stemple.

— that he was informed at that time that if he put the child in the Carroll School, it would be at his expense. At least, if he did it without the Town's permission.

THE COURT: Well, he's agreed to that.

As I understood the testimony, he said that Mr. Michael told him that it was his decision; that he would have to pay for it. Of course, there was a hearing coming up and the Town would abide by the result of the hearing.

Isn't that what you said?

THE WITNESS: Yes, your Honor.

Q Now, you had a meeting at the Memorial School on May 18th, 1979; is that correct?

A Yes, it is.

Q And at that meeting, various people made certain representation; is that correct?

A We had a — we had a meeting, representations, [3-43] discussions. Certain things were stated, yes.

Q Someone said, at that meeting, that Michael had a memory problem; is that right?

A Absolutely.

Q Who said that, please?

A I believe it was both Ms. Meade and Ms. Mason. I had never met them before. Other than the fact we had faced them many times since then, I now can differentiate between the two. I didn't know who was who at the time, and I can't tell you which said what.

Q And at that same meeting, you recall, sir, that a person said to you: "We cut Michael's reading time with Mrs. Black in half and we did it without your consent"?

A Not quite that way.

And they didn't say — I know who said that, and certainly she didn't say it "with Mrs. Black," she was Mrs. Black.

As far as the time being cut, it was said by Mrs. Black and she said: That we — or Michael's time had been cut in half, or words to that effect, and it was kept from you. You didn't know about it. You weren't told about it. And I never told you.

The exact words of that, I don't recall.

[3-44] But that one was Mrs. Black, absolutely.

Q Mrs. Black told you that she had kept it from you; is that it?

A No. Mrs. Black told me it had been kept from me. Mrs. Black had said that she never mentioned it. That it had been kept from me. She was never asked. She was an employee.

And she pretty much, you know, gave us the inference that I am an employee and doing what I'm told. And that's the inference I drew in the way she explained it.

Q Never mind your opinion, sir.

She never told you, did she, that no one had ever told you about the time being cut in half?

A Oh, yes. She said it —

Q Well, Mrs. Black wouldn't know, would she — strike the question.

Somebody also told you at this meeting of 5/18/79, if I remember correctly, that you had been given false progress reports; that you had been told that Michael was making progress when, in fact, he was not.

Would you tell me who said that to you?

A No one said we were given false progress reports.

We were told that Michael was not progressing [3-45] the way we had been told, the way we had been led to believe. No one said: You had been given false reports. Michael has not progressed the way we expected. Michael has not made the progress.

And it was almost: We're sorry that he hadn't been; that you weren't aware of it.

It wasn't anyone said: False reports.

Q Did someone say words to you to this effect, as you testified Friday in court: Michael has not been making the progress that you were told he was making?

A I would say that would be correct.

Q All right.

A Not the exact words. That is a summation of what was said to us. Yes.

Q Who told you that?

A I don't recall. I believe it could have been either Ms. Meade or Ms. Mason. It could have been Kathryn Black. It could have been Myra Fournier.

I am not sure. I would tend to think that it was probably Kathryn Black.

Q Kathryn Black said to you, in effect, at this meeting, that she had been telling you that Michael had been making progress that he wasn't, in fact, making.

Is that right, sir?

A No, it is not.

[3-46] Q No, it isn't right?

A No.

Q She never said anything like that; isn't that correct?

A Well, she said — if you will, Kathryn Black told us that Michael was not making the progress that we had been led to believe that he was making. Or words to that effect.

She did not say she kept it from us. She did not say who kept it from us. That we had been led to believe, or — words. It did not come out as though someone lied to us and gave us a sheet of paper saying: He is 99 percent here, but he's only 40, and we're saying it's 99.

It never came that way. It came out that Michael, we were not being told of Michael's true progress. It looked better than it was. How the exact or what the exact words were, I don't recall. But it certainly came across to me that Michael was not making progress that we were led to believe he was making.

Q And you think Kathryn Black said that to you; is that right?

A I believe it was said by Kathryn Black. And I think it was agreed to. It was talked about.

Q You think the other people said that that was true: [3-47] That Michael was not making the progress that you had been led to believe that he was making; isn't that right, sir?

A I didn't say anyone else said it. I said it was talked about, his lack of progress. Not that they said and went along that there were reports, or there were anything else. His lack of progress was discussed.

Q Mr. Panico, isn't it a fact, sir, that all you were told at that meeting was that Michael had not made the progress that Mrs. Black had hoped he would make; is that right, sir?

A That was said, but there was other. No, sir, that is not all that we were told.

Q Now, you also were at a meeting of June 4th, 1971; is that correct — yes, June 4th — I'm sorry. June 4th, 1979.

A Yes.

Q And at that meeting, someone said, is that correct, that Michael has a severe emotional problem?

A I don't believe anyone at the June 4th meeting really said it that way.

Jean Arin said that Michael had been tested by Mr. Cavanaugh and had emotional problems, severe emotional problems. Whatever the terminology was. That Michael had emotional problems, and that's what [3-48] was said. I don't think it really came up at that point that it was severe emotional problems.

Q You don't think the word "severe" was used; is that correct?

A It might have been. I'm not exactly 100 percent certain. It's been over three years, I believe. And I'm not certain if the word "severe" was used at that point in time. It probably was.

Q And, in fact, this was entirely consistent with your opinion at that time; that Michael had an emotional problem?

A No. The School's concern or the School's explanation of Michael's emotional problems was far different than what mine is. And I think I tried to explain before what my interpretation of an emotional problem is. It is not a psychological term, per se.

The School's made it very specific what Michael's emotional problems were. And they were not what I felt they were.

Q I'm going to direct your attention, please, to Page 213 of the transcript before the Hearing Officer, Line No. 13, and I'll ask you to read the question, sir, at that page in the transcript, and your answer to it, please.

A Line No.?

[3-49] Q 13, please.

A 13?

Q Yes.

A "Do you think Michael had emotional problems, sir, during the year 1979?"

Q What was your answer, please?

A The answer is "Yes" to that question.

Q Thank you.

Now, someone at the meeting of June 4th, 1979, also said that Mr. McAleer's class was for — and I'm reading your exact words —"emotional children."

Do you remember testifying to that on Friday?

A I — no, I don't remember testifying to it.

But, yes, I'm certain that was stated at the meeting.

Q Who stated that, please?

A I believe it was Jean Arin.

Q Did Mrs. Arin, at the meeting of June 4th, 1979, read Mr. Cavanaugh's report?

A She did not. She read, maybe, an excerpt or a note she had. But she absolutely did not read his report.

Q Did you read the report at the meeting?

A No, I did not.

Q Was the report available for you to read?

[3-50] A For me to read? I think I had already had a copy.

Was it at the meeting? I have no idea.

Q You had a copy prior to the meeting; is that correct?

A Absolutely.

Q And had you read it prior to the meeting?

A I sure had.

Q Was there any statement in that report that Michael had a severe emotional problem?

A I would have to see the report. Whether it said he had a severe emotional problem in the report or not, I don't know.

Q You don't remember what the report —

A I don't remember whether that word is actually in the report or not. No, I do not.

Q Do you remember whether there was any statement in the report that Michael had a primary emotional problem?

A I don't know, again, if that is or not in the report.

In the written report, you're not talking about the oral, the written report?

Q That's correct.

A I honestly don't know. Again, I'd have to read the report. I don't know if the word "primary" is used or not.

Q Now, on —

THE COURT: I gather this report is part [3-51] of the transcript?

MR. BERMAN: It is, indeed, your Honor.

It's one of the exhibits.

MR. ROSENBERG: It's Parents' Exhibit 40.

THE COURT: Go ahead.

Q Now, Mr. Panico, on June 27th or 8th of 1979, you picked up an IEP from Mrs. Arin; is that correct?

A I believe my wife picked it up.

Q You got it and you read it, is that right, on that —

A Yes, I did.

Q — date or those dates?

Did you read it 25 times, sir?

A I read it numerous times. I don't know if were 25, 20 or 30. But I know I read it at least, at least — let's put it this way, more than 15 times. I read it and read it and read it.

Q Do you remember telling the Hearing Officer you read it 25 times, sir?

A I very well might have. I don't know if I said I read it 25. I might have said I read it approximately 25. I don't think I would have put a specific number of times on it. I could have, but I don't think I did.

Q And you rejected that plan; is that correct?

A Yes, I did.

[3-52] Q Before you rejected the plan, did you show the plan to Dr. Levine? Dr. Melvyn Levine of Medford?

A Prior to rejecting it? No, I did not.

Q Did you show it to Dr. Lott?

A Excuse me, for one moment.

Do you mean, when showing, actually show them the physical plan or discuss it with them?

Q Showing them the plan?

A No, I did not.

Q Did you show it to Dr. Eisenthal?

A No, I did not. I didn't have it.

Q Did you show it to Kathryn Black?

A No, I did not.

Q It's a fact, isn't it, that at the time you rejected that plan, you had not shown it to any of the medical consultants whom you had consulted with respect to Michael's condition?

A The actual paper plan, I had not.

Q Now, Mr. Panico, you agree with me that you have had not formal training whatsoever in teaching children with learning disabilities?

A That's correct.

Q And you've had no formal training in the teaching of reading?

A That's correct.

[3-53] Q And you've had no formal training in diagnosing children with learning disabilities?

A Correct.

Q And you've had no formal training in ameliorating the problems of children with learning disabilities?

A Correct.

Q Now, you have testified, I believe, to the reasons why you rejected this plan; is that correct, sir?

A Are you talking today or are you talking at the Hearing?

Q Both at the Hearing and Friday?

A I did.

Q And it would be fair to say, isn't it, that one of the reasons that you rejected this plan was that you were angry because the Town had, in your opinion, cut Michael's time with Mrs. Black in half without consulting you, and had done certain testing without consulting you; is that right?

A Not at all. That's not the reason the plan was rejected.

Q I didn't say that.

That's one of the reasons; isn't that right?

A No. That in and of itself, that certainly was the premises for one of the things that I used to reject the plan, which was, at this stage of the thing, after what had happened, after the violations that had been [3-54] incurred, after cutting Michael's plan, after ignoring the diagnosis of dyslexia, I had no more faith. I now received a plan that was unsigned; people were supposedly at the meeting who weren't even there; the Principal hadn't signed the plan; the Superintendent hadn't signed it. I received a piece of paper that was thrown together in one day because they were late.

Yes, that was one of the reasons I rejected the plan.

Q Oh, I beg your pardon, Mr. Panico.

The fact that the plan wasn't signed was a very important thing to you, wasn't it, sir?

A It was awful important at that point in time. It was signed by other than Jean Arin. Yes. It was not signed by the Principal of the School.

Q I see.

Did you ever receive unsigned plans from the Carroll School, sir?

A Absolutely.

Q And that didn't bother you at all, did it, sir?

A Not at all. Because it was not the same situation. They had never cut anything. I was not on a commitment with them. It was not a — a plan was not even required from the Carroll School. The plan was done just for my benefit and Michael's, and it wasn't a requirement [3-55] that had to be followed.

A [*sic*] You said to yourself at that time, when you got the plan from the Carroll School: In my knowledge of the law, this isn't a required plan and I don't care whether it's signed or not. But that plan they gave me in Burlington, that was an unsigned plan and I would reject it for that reason.

Is that correct, sir?

A I don't think I said that I would reject the plan because it were unsigned. I said that was one of the things of the Burlington plan that concerned me, it was not signed. I had a signed plan, which was cut, after assurances from Mr. Foley, after assurances from the Town of Burlington that the plan would not be cut. It was cut. And that was a signed plan.

I now had one unsigned by even the School Principal. I had no faith in it at that point in time. It was certainly one of the things I looked at. No question.

Q Mr. Panico, did you ever ask anyone to sign the plan?

A I tried to sit down with the Town of Burlington —

Q No, no. Mr. Panico.

A — on numerous occasions for that purpose and to discuss the plan.

Q Did you ask anyone to sign the plan?

[3-56] A No, I didn't ask them to sign the plan.

Q Now, another reason I believe you testified to for rejecting the plan, sir, was that Mrs. Black told you that if Michael was placed in John McAleer's class, that would destroy him; is that right?

A That was absolutely said. That was one of the reasons I rejected it. The word "destroyed" might not be the correct word. It might have been "kill." It might have been "kill him." It might have been "ruined." It was a word similar to destroy or something of the same meaning.

Q Mrs. Black testified at the Hearing before the Hearing Officer; is that correct?

A Yes, she did.

Q And she is not going to testify at this hearing; isn't that right?

A I don't think so, no.

Q And, as a matter of fact, you were present the whole time Mrs. Black testified, weren't you?

A Yes, I was.

Q And, as a matter of fact, sir, you wrote out or told Mr. Gallagher what questions to put to her, didn't you?

A No, I did not. I might have written out a question for her, or a couple of questions. I certainly didn't [3-57] prepare his questions. I did not prepare the witness.

I wasn't even present, I don't believe, when he did prepare the witness.

Q Did you ever hear Mrs. Black testify at the Hearing that putting Michael in John McAleer's class would ruin him, kill him or destroy him?

A Testify at the Hearing? No, I did not.

Q Did you ever hear her tesify at the Hearing that she had told you words to that effect?

A No. And I do not believe she was ever asked that question or anything similar.

Q Did you testify at the Hearing as for your reasons for rejecting the plan?

A Yes, I did.

Q And did you tell the Hearing Officer, sir, at that Hearing, that one of the reasons you were rejecting the plan was that Kathryn Black had told you that putting Michael in Mr. McAleer's class would ruin, kill or destroy him?

A I believe I did. Yes.

Q Well, sir, I'm going to give you an opportunity to review your testimony and see if you can find where you said that.

A If you would give me the transcript, I would be very happy to.

[3-58] THE COURT: Do you want him to look for it?

MR. BERMAN: It's not there. But I would certainly give him an opportunity to look for it.

I have many more questions between now and recess, so that. . .

THE COURT: All right.

Q Did you ever tell, prior to August 1st, 1979, any person connected with the Burlington School System that you were rejecting this plan because it was not properly signed?

A I never told anyone I was rejecting it because it was not properly signed.

Q Now, you were also concerned, Mr. Panico, because in your opinion this plan failed to indicate how Michael would acquire the skills that he was supposed to acquire thereunder; is that correct?

A Certain of the skills, yes. I was. I was concerned over that. Yes.

Q And, in fact, you rejected the plan because you felt that it didn't explain how these skills were going to be imparted; is that right?

A If I might, Mr. Berman, I didn't reject the plan for any one of the specific reasons. You're asking me: Did I reject it for that reason? No, I didn't.

[3-59] Was I concerned with that thing in the plan? Yes, I was.

That was one of the things that went into my decision to reject the plan.

Q Mr. Panico, I didn't ask you if this was the reason, I asked you if this was a reason.

Was it a reason why you rejected the plan?

A It was one of the things that went into my decision. Absolutely.

Q And you told her Honor that on Friday; isn't that so?

A I believe I did.

Q Now, then, Mr. Panico, did you ever go to Mrs. Arin or go to anyone in the Burlington School System and ask how they were going to implement this plan?

A I had been told how they were going to implement it very clearly. With no reservations. I was told it on May 25th. I was told it on June 4th. They were going to implement a plan for a child with emotional problems. He had no reading disability. I was told that. He had no learning disability. I was told that. I was told that Michael would be treated for emotional problems. When he got over his emotional problems, he would learn to read on his own. He did not need special training. My wife and I were both [3-60] told that on two separate occasions.

Q Come on, Mr. Panico. You know you read the plan 25 times; isn't that right?

A Absolutely.

Q And after you read it 25 times, Mr. Panico, you didn't know how the School System was planning to implement the objectives of the plan; isn't that right?

A No, it's not correct.

Q You knew how the School System was going to implement the objectives in the plan; is that correct?

A The objectives of the plan changed, Mr. Berman, from the time it was given to me to the time of the Hearing. When it was given to me, it was a plan for an emotional child, which is the way I addressed it, the reason I rejected it, and we walked into that hearing expecting that to be the issue. It came out about a reading disability at that hearing, from the Town's point of view, it was now a class for reading. My answers were answers to questions. There were a number of reasons why that plan was rejected.

Q Excuse me, Mr. Panico, I think you're going way —

MR. BERMAN: I pray your Honor's judgment. I think this is going way beyond the scope.

THE COURT: What's the next question?

Q Mr. Panico, did you know, when you got the plan, how [3-61] the Town was planning to implement it?

A How they were going to implement a plan that I received on June 27th, yes.

Q Are you trying to tell this Court that you got two different plans? That there was a plan that was given to you on June 27th, and then another plan was substituted at the Hearing?

A The written plan remained the same. The plans were absolutely different.

Q The written plan was absolutely the same, wasn't it, at all times, sir?

A Yes, it was.

Q And you looked, you read the objectives of the plan 25 times, or something like that; is that right, sir?

A I read the objectives, whatever the number of times was. It might have been 25. Somewhere well over 15, yes.

Q And you testified here on Friday, didn't you, that you didn't know how those objectives would be implemented?

A That's correct.

Q Now, I'm asking you: Did you ever go to anyone, Mrs. Arin, or anyone else, and say: How do you plan to implement these objectives? Did you go to a person and ask the question?

A I tried to, sir.

[3-62] Q Well, how did you — did you actually ever go to — let's start with Mrs. Arin.

You knew she had drawn the plan; isn't that correct?

A Yes, I did.

Q Well, from June 28th to August 1st, did you ever call Mrs. Arin on the telephone and say: Mrs. Arin, I've read your plan and I do not understand, with respect to the first ten objectives, how you're going to implement it.

Did you do that, sir?

A No, I did not.

Q Did you try to call Mrs. Arin to ask that question?

A Mrs. Arin, specifically, no.

Q Did you try to call John McAleer between June 28th and August 1st and ask him how he was going to implement the plan?

A I did call John McAleer. I don't know if it was between — I believe it was in July, prior to August 1, yes.

Q Did you ask Mr. McAleer how he taught reading?

A I asked him if he taught reading. I know that, but I didn't ask him how he taught reading. No, sir, I did not.

Q What did Mr. McAleer tell you when you asked him if he taught reading?

[3-63] A I'd have to put it in the context of the conversation to answer that. I don't think it was a — if I could give you a specific answer to just that one question.

Q You can't tell me whether Mr. McAleer answered your question or didn't answer your question?

A There were a series of questions put to him at the same time. It wasn't just that one specific issue that I asked him.

Q One of the questions you put to him, sir, was: Do you teach reading? Is that correct?

A Not as a specific question.

Q You didn't put that question to him?

A It was in the context of many other questions.

In other words, it was maybe a rambling question or a group of questions. But there was an answer that came about as a result of the questions.

Q Did John McAleer tell you whether or not he taught reading?

A I can't answer that question.

[Pause.]

Q You testified that you didn't go to Mr. McAleer's class on June 2nd because you'd been advised by a Dr. Lott not to take Michael to that class; is that correct?

A That's correct.

[3-64] Q Did you go to that class by yourself, sir?

A At what point in time?

Q On June 2nd?

A No, I did not.

Q You understood perfectly well that you could go by yourself, didn't you? That you weren't required to bring Michael with you?

A I — when the appointment was set up, the thing was set up, was to bring Michael to meet his teacher and for me to observe the class, I didn't bring Michael and I didn't go. No, I did not.

Q And you didn't go to him —

A I apparently assumed I could have gone, yes.

Q Now, another reason I believe you gave for rejecting the plan was that there were certain statements on Page 12 concerning Michael's reading ability that you considered to be erroneous; is that correct?

A I'd have to see the page. I'm not certain what page number.

Q Well —

A There were certain things in the plan.

THE COURT: The one that gives 200 words and you felt he only had five.

THE WITNESS: That certainly was erroneous.

Q Did you ever call Mrs. Arin and ask her where she [3-65] got that information?

A No, I did not?

Q Did you ever point out to her that you considered the information false?

A Again —

Q Erroneous? Strike the word "false."

A Again, at what point in time?

Q All right.

Between June 28th, 1979, and August 1st, 1979?

A No, I did not.

Q Calling your attention to the summer of 1980, did you become aware, during the course of that summer, that the Town had requested the opportunity to reevaluate your son?

A I never took it that way, no. I knew there was a request to reevaluate Michael. I did not feel that it was ever a request of the Town of Burlington to reevaluate Michael. It didn't come that way.

THE COURT: I don't understand that.

THE WITNESS: The —

THE COURT: You said you knew there was a request but you knew there wasn't a request?

THE WITNESS: There was a written request, your Honor, to me at one point, and I believe it was [3-66] the summer, which was 766 Core request. It was sent out for me to sign certain forms, et cetera, and to get in touch with the person whose name was on there if I had questions, which I called Jean Arin's office three times, and she wasn't in to back to me. I received a letter in response to my letter, which I wrote to the Town, and I received a response from Mr. Berman, saying: I am representing the Town in litigation — and he responded to it — and we'll use if for whatever lawful purpose we wish to test him.

So when I'm saying I don't believe it was a request by the Town to evaluate Michael for an educational plan, I believe there was a request to reevaluate Michael for use in the judicial proceedings.

Q Did you ever ask whether or not this was a — as a matter of fact, sir, you received the same forms you had received in the past, when a reevaluation was requested; is that not correct?

A I had never received forms for a reevaluation, ever. I had received forms, part of the forms, one time, and only one time. And that was in June of 1977. I did not receive them the subsequent time he had a Core. And I received them, again, in the summer of 1980, I believe.

Q But these were the same forms you had received [3-67] in June of 1977, for the most part, weren't they?

A There was a lot more in these than there were in the last ones. Yes, sir.

Q But, nevertheless, they were basically the same forms? For all the same assessments; isn't that right?

A I don't think they were the same assessment requests. I'm not sure on that. The assessments, they were similar ones. I don't believe all the assessments — that, I couldn't answer without seeing both requests. There might have been different assessments, different tests to be done.

Q And, sir, you made a decision at that time you would not make your son available; is that correct?

MS. JANOS: Objection, your Honor.

THE COURT: I think we're getting into the areas that I said I would not hear; are we not?

MR. BERMAN: No, I'm not getting into the question of what the progress would have been if he had —

THE COURT: Well, nor into the conduct of the parties concerning evaluations as bearing on what is appropriate for this child.

MR. BERMAN: Well, your Honor, I will represent to the Court that there will be testimony that it is impossible for a Town to devise a program for a [3-68] child without —

THE COURT: That is why the burden is on the parents to show what the appropriate placement would have been for the years subsequent to 1979, 1980.

MR. BERMAN: I understand, your Honor.

But we have to, assuming they make some kind of showing, which I don't know whether they will or not, that the Carroll School was an appropriate placement.

THE COURT: Why don't you wait for rebuttal?

MR. BERMAN: Fine. I suppose Mr. Panico will be here. I could call him on this point then.

THE COURT: Why don't we take a recess, now, and I'll see counsel on the other case.

[Recess.]

Q Mr. Panico, I believe it was your testimony that John McAleer at the Core Evaluation Meeting of June 4th, 1979, did not discuss his reading program; is that correct?

A He definitely didn't discuss his reading program.

He — I'm sorry. He did say he taught reading. But I mean he did not discuss any specific program or anything else. When the question was asked, he said: Yes, I teach reading and academics.

[3-69] That was it.

Q So that the sum total of Mr. McAleer's discussion of his program on June 4th, 1979, was to say, "I teach reading and academics," period. He didn't elaborate. He didn't explain. Is that right?

A I don't believe that's the question you asked me. You asked me if he discussed his reading program. Mr. McAleer had a lot to say at that meeting. But about reading, that was the extent of it.

Q I'm asking you about reading, specifically, sir.

A That's all he —

Q All he said was, "I teach it." He didn't elaborate or explain; is that right, sir?

A Absolutely.

Q Now, in June of 1977, you received a packet of material, did you not, from the —

THE COURT: '77?

MR. BERMAN: Yes, June of 1977.

Q — from the Town of Burlington for a Core Evaluation; is that correct?

A Yes, we did.

Q And one of the — this packet of materials called for a medical evaluation; is that right?

A Yes, it did.

Q And, as a matter of fact, you arranged to have a [3-70] medical evaluation performed by the person who had been Michael's pediatrician from birth, didn't you, sir?

A I didn't arrange that. I — I did and I didn't.

We were told it had to be his pediatrician. We were told to take this, he had to have a medical exam, bring this to his pediatrician.

Q And you did just that?

A Yes, I did.

Q Did you, in June of 1977, ask who would pay for that examination? —

A I never asked because I assumed we had to.

Q Now, sometime in 1978, did Dr. Levine refer Michael to Dr. Lott?

A I don't believe it was 1978.

Q When was it, sir?

A It was the — late fall, early winter of the second grade. I believe it was 1977. I believe it was sometime around November of 1977. It definitely was the second grade.

Q So it would have been late '77 or early '78; is that correct?

A It was late — it wasn't early '78. The referral was made — would have been made in '77, if that was the second meeting.

[3-71] Q Can you tell me what the purpose of this referral was, please?

A I'm sorry?

Q Strike the question.

A The purpose —

Q Dr. Levine referred Michael to Dr. Lott because Michael was suffering from severe headaches and had other symptoms; is that right?

A He referred him to Dr. Lott for two reasons. No. 1, he felt Michael had juvenile migraine, but he wanted him to go to a neurologist. No. 2, he thought Michael had a rather severe learning problem. He called it dyslexia. And he felt that Dr. Lott could confirm that at the Mass. General Hospital, also.

Q And that was not part of any Core Evaluation, was it, sir?

A Oh, no, it was not.

Q And at the time that examination was performed, you never asked the School Department to reimburse you for the cost of it, did you?

A I never knew I could ask them.

Q Did you ask them, sir?

A No, I did not.

Q Now, in 1979, Mrs. Arin was about to arrange, at the School Committee's expense, to have Michael examined [3-72] by Dr. Bauman; is that correct?

A No. She was not going to arrange it. There was a conversation at that point that I wanted additional testing done, and she suggested that maybe it might be independent. I didn't know what we wanted. We sat down and went over some of the tests. She made a suggestion that maybe she could get Dr. Bauman. I said: Fine, why don't you try to set it up. I would prefer Dr. Lott, whom I would be seeing. If he can do it, I'd rather he do it.

But, yes, as far as it goes — no, it wasn't that way. It was a discussion and Dr. Bauman's name did come up, and she might — I think it's a she — would coordinate testing.

Q And at some time you were told, were you not, that in fact it had been set up with Dr. Bauman; weren't you, sir?

A I think we were told after we had told her to cancel; that she had already had it set up, yes. But we had Dr. Lott.

Q And you said you would have Dr. Lott do it; isn't that right?

A I would have Dr. Lott? No. Dr. Lott would coordinate it. The School had agreed to have Dr. Lott coordinate it.

[3-73] Q Did you say that you wanted Dr. Lott to perform the testing and coordination function, sir?

A I'm sorry. Dr. Lott to perform the testing?

Q And coordination functions that Dr. Bauman would have performed if he had gone forward with Dr. Bauman?

A I said I would prefer Dr. Lott, absolutely. Yes.

Q Now, there were some home assessments done in 1977; isn't that correct, sir?

A Yes, there was one.

Q Did you read those home assessments?

A Yes.

[Pause.]

Q Were you interviewed in connection with the home assessment?

A Yes.

Q Was your wife interviewed?

A Yes, she was.

Q I'm going to call your attention to the home assessment, Summary of Home Assessment, Michael Panico, 28 Fieldstone Drive. And I'm going to ask you to look at this paper, ask you if you've ever seen it before today?

A Yes, I have.

MR. ROSENBERG: Excuse me. May I know what exhibit you're referring to, Mr. Berman, please?

MR. BERMAN: Right.

[3-74] I am referring to S-3C.

THE COURT: That is one of these in the packet?

MR. BERMAN: It should be one of that — part of that packet. Yes, your Honor. I can't vouch that it is, because I didn't file it. But it should be.

MS. JANOS: It is, your Honor. It should be at the beginning of the School exhibits, or at the beginning.

May I just ask, your Honor, if you have a list, a summary of exhibits at the beginning of that packet? About a six-page, seven-page list? It's entitled Certificate of Record.

THE COURT: Yes.

MS. JANOS: Okay. That lists all the exhibits that are exhibits.

Q Would you please the material, sir: "Reaction to illness, accidents, hospitalizations, and any acute or chronic handicapped conditions"?

A "Since infancy, he has been bronchial and is often congested. He has occasional headaches with vomiting, possibly migraine. Age one, fell in crib, stitches in his mouth. Age three, fell in livingroom, stitches near his eye. Age five, stitches for cut mouth. [3-75] Last year, fell off bike, and had

concussion. Plus a few other falls. Then he had X-rays. He has never been hospitalized."

Q Mr. Panico —

THE COURT: Excuse me, Mr. Berman. What is the number of that exhibit, please?

MR. BERMAN: S-3C.

Q And you first saw that, sir, back in June of 1977; is that correct?

A I don't recall when I first saw it. I don't think I saw it until well after the — I think it might have been July. I was mailed the assessments. I had not seen them until — they were mailed after June 6th.

Q Well, in June or July of 1977?

A Pretty sure it was in July.

Q And did you ever make any effort to correct any of the information —

A No.

Q — that you just read?

Did your son ever go on any field trips by bus while he was a Memorial School?

A I don't think so. There could have been one. I don't think there was any more. The reason I can state that is my wife was an aide at that school and went [3-76] on just about every field trip Michael went on as their driver, and Michael was always with her. She took the car. I think there might have been one by bus.

Q Mr. Panico, isn't it a fact that after the first bused field trip that Michael took, the School Authorities requested that Michael not go on any further field trips unless accompanied by one of his parents?

A Absolutely not. Never.

Q Never said that?

A Never.

Q Now, one of your problems with the evaluation that you were given in 1977 was that — strike that — in '79, was it showed Michael as having a much larger sight vocabulary and much more reading skill than in your opinion he really had; is that right?

A That was one of the things, yes.

Q Mr. Panico, did you ever tell Michael's first-grade teacher that Michael was reading from the Boston Globe? With you, of course?

A I don't know how I could have. No.

Q You don't remember saying that?

A No, I certainly don't.

Q Did you ever have a psychological report sent home during Michael's second grade, sent home with him [3-77] by the School?

A During the second grade?

Q During the second grade. Yes. Yes, sir.

A I don't believe I ever did. It's possible, but I'm not certain. No I'm certain there was no psychological report. Absolutely not.

If we're talking the same context of report, there never was one.

Q I would like to direct your attention, please, to Page 43 of the Hearing Officer's transcript.

MR. BERMAN: And I might like to show P-19 to the witness, if you have it there, Mr. Rosenberg.

MR. ROSENBERG: Sure.

This is Parents' Exhibit 19?

MR. BERMAN: That's right.

THE COURT: What's the question?

Q Does this refresh your recollection, sir, that there was a psychological report sent home with Michael while Michael was in the second grade?

A No. 1, I don't — I didn't — if this is it, I did not consider this a psychological report. It's a progress report. Quarterly report. I was referring to something like Mr. Cavanaugh had, or something to that nature.

I'm sorry. This — if you want to call it [3-78] a psychological report, I absolutely received this. No question.

Q Well, did you refer to it as a pyschological report in your testimony before the Hearing Officer, sir?

A I — yes, I did. I —

Q Would —

A "Potentially damaging as a psychological report." Yes.

Q Would you please read the testimony that you gave, starting at Line 14?

A If I could, I don't know what preceded it, though. I don't know if I referred to it or somebody else referred to it first. And I just used the same words. I can't answer that.

THE COURT: Mr. Panico, you have able counsel who can correct any misimpression that may be created.

I ask that you, please, just answer the question.

A "No. I am very concerned about sending home with a child something that is potentially damaging as a psychological report. It could get lost by, read by anybody in the neighborhood, or the child or anybody else. It could be read by Michael. He could have it read, or somebody read it to him. I think that could be extremely damaging to my son and my family, if they were. This isn't the thing you want to publish [3-79] in the newspapers or let everybody know."

Q As a matter of fact, sir, you've indicated, at the Hearing before the Hearing Office, that you were concerned that Michael might read that report himself; is that correct?

A I said it, yes.

Q All right.

Incidentally, during the recess, you've had an opportunity to see whether or not you had ever made a statement when you

testified before the Hearing Officer that Kathryn Black had told you that placing Michael in John McAleer's class would destroy, kill or ruin him, or some words to that effect.

Were you able to look at your testimony to see if there was such —

A A part of it, I was able to look at. Yes.

Q Did you find anything like that, sir?

A I found something referencing it, that the words on a question asked by you: Did you hear Kathryn Black say it would destroy him? I think that was the terminology. And I said: No, I don't think she — it's over there, on the page, and I know what the page number is, I could read it for you.

MR. ROSENBERG: Your Honor, we have not completed our review of the entire transcript, and —

[3-80] THE COURT: I understand that.

MR. ROSENBERG: Do you want to read this, what we've found, and may pertain to the. . .

MR. BERMAN: I'm perfectly willing to read it. It's entirely consistent to the fact that he never heard her say it.

THE COURT: Well, without your interpretation of what he says, if you want to read it, go ahead. If you want to reference it, that's fine, too.

MR. BERMAN: No, not particularly.

THE COURT: If you want to do nothing with it, that's even better.

MR. BERMAN: I wiil do nothing with it, your Honor.

Q Do you continue to carry medication with you for Michael's headaches when you're out with Michael?

A I do.

Q When did Michael cease to carry that medication?

A He was carrying aspirin, oh, I would say, he'd keep a couple, we'd given them to him and he'd put them in his pocket, up through — I think he stopped over last summer.

Q Now, I believe you testified this morning that at one of the Core Meetings a teacher suggested that Michael be enrolled in a total program at the Landmark [3-81] or the Carroll School.

Is that correct, sir?

A I don't believe that's what I testified to. I think I said a teacher recommended that he be placed in a total program, and the Carroll and Landmark Schools were mentioned either there or right after the meeting.

Q All right.

A In a total program.

Q At which Core Meeting would that take place?

A That was the 5/18/79 meeting.

Q And which person said that?

A I don't recall.

Q The Carroll School, sir, as far as you know, is exclusively a school for children with reading disabilities; is that right?

A Reading disabilities?

Q Yes.

A I think that's the main focus of its curriculum, yes. I'm not certain that it's 100 percent that way. I don't know that for a fact.

Q Did you testify this morning that right now your son is not the least bit frustrated with his school work?

A I don't know if I testified to that this morning.

If you want me to answer. . .

Q Is he the least bit frustrated?

[3-82] A He gets frustrated. Absolutely. If he's trying to do things, he gets frustrated, trying to do school work. Yes.

I was using "frustrated" in a lot of different ways, and he does get frustrated if he makes a mistake. Yes, if he finds something very hard to do.

Q Do you personally understand, Mr. Panico, that the purpose of aid to the handicapped children is to enable these children to return to a real-life setting?

MR. ROSENBERG: Objection, your Honor, if that's calling for a legal conclusion?

THE COURT: No, he's asking for his state of mind. I'll allow it as to that, for whatever relevance it may have.

MR. ROSENBERG: Okay.

A Do I think the focus of it? I don't think that's the focus of the law. I have read the law quite a few times. To be the focus is to help the handicapped, and in a least restrictive atmosphere that you can — you know, that there's an appropriate program.

THE COURT: Help them to what?

THE WITNESS: Depending on their needs, your Honor, to help them — if it's a child like Michael, with a specific learning disability, I guess to help him to learn. If it's a child who is blind, [3-83] help him to function, et cetera. It could even go so far as to, I assume, build ramps for a handicapped child if he uses a wheelchair.

Now, that's, you know, how I look at the law, yes.

Q But you don't understand, sir, it is not your understanding your personal understanding, that the purpose of this law is to return a child as rapidly as possible into a real-life setting, where he can partake of activities, as best he's able, with nonhandicapped children?

A I don't see how it could, when the — how can you return somebody. Before they had law, they had no place to put them. They didn't have any place for them. How could they be returning them? The purpose of the law, I assume, is to educate them or to help them. Then, if possible, get them back into a situation where they were with normal people or within a class with least restrictive, yes.

Q But that's your understanding?

A Absolutely.

MR. BERMAN: Thank you. I have no further questions.

THE COURT: Anything else, Mr. Rosenberg?

MR. ROSENBERG: Just one question, your Honor.

[3-84] Redirect Examination by Mr. Rosenberg

Q Do you remember, Mr. Panico, during Mr. Berman's cross-examination, his asking you whether you had with you today certain notes from your — that you'd taken at the May 25th meeting.

A Yes, I do.

Q And was your answer to that, you did not have them?

A I did not have the notes.

Q I'm going to show you a document, which was Parents' Exhibit 25 in the Administrative Hearing, Mr. Panico.

Would you take a look at those, that exhibit, please?

A Yes, sir.

Q Is that a copy of the notes that you took at the May 25th meeting?

A Yes, it is.

MR. ROSENBERG: Thank you.

[3-85] Recross-Examination by Mr. Berman

Q Mr. Panico, did you take these notes at the hearing or later?

A Right where I was sitting?

Q As you were —

A Right where we were sitting at. Except on the left-hand side of the page, there's two lines, I think, up there written, those were done when I went home.

MR. ROSENBERG: Except it was not at the Hearing, it was at a meeting.

THE WITNESS: May 25th meeting.

MR. BERMAN: No further questions.

THE COURT: Thank you, Mr. Panico, you're excused.

[Transcript of a portion of the trial held on May 18, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes testimony of Dr. Marcel Kinsbourne, an expert witness recalled in rebuttal by the plaintiffs, found at Transcript Volume IV, pages 4-135 to 4-150, and reproduced in the Record Appendix, Volume II, pages 4-135 to 4-150.]

[4-135] MARCEL KINSBOURNE, Recalled

Direct Examination by Mr. Berman

Q Dr. Kinsbourne, please identify yourself for the record.

A I'm Marcel Kinsbourne.

Q And you understand, sir, that you're still under oath?

A I do.

Q And you've been present, have you not, during this entire case?

A Yes.

Q And did you hear the testimony yesterday of Dr. Melvin Levine?

A I heard it.

Q And did Dr. Levine's testimony in any way change your opinion that Michael Panico is suffering from an attention deficit disorder?

A No.

MS. JANOS: Objection, your Honor. I don't think that this is appropriate rebuttal testimony.

THE COURT: Well, insofar as he's talking about what's appropriate for the following years, I'll allow it. To the extent that Dr. Levine said the same thing, I'm not sure why he would disagree, in any event.

Q Well, would you please explain to her Honor the basis [4-136] where the areas in which you disagree with Dr. Levine and the basis for your disagreement?

A Yes, Mr. Berman.

Whereas, as your Honor has remarked, Dr. Levine and I substantially agree on the attention deficit, which I not therefore further characterize. I regard the claim that Michael has been dependently of that, a visual-processing problem of the type Dr. Levine described as speculative for the following reasons: First of all, when a child has an attention deficit, that can be potentially affect any test a child is given. It makes interpretation of all tests difficult. In other words, although one always gets a result on a test, the result may not mean what it would otherwise mean if the child's attention towards the test procedure was inconstant.

In particular, this is the case — excuse me, perhaps if I have a drink of water.

[Pause.]

A [Continuing.] This is particularly the case, if the tests involves multiple-simultaneous features, a number of things a child looks at or is supposed to look through at the same time, and I will come back to that point.

So, in fact, the findings on the record [4-137] and the findings that Dr. Levine's own group produced, could well be sufficiently explained by the child's fluctuating and inconstant attention.

However, there are two other points to note.

One is that the conclusions drawn by Dr. Levine from the tests he gave were different from those drawn by previous experts, both inside and outside the School System.

THE COURT: I'm sorry, what were different?

THE WITNESS: The conclusions he drew from the tests he gave had no precedent, in conclusions drawn, by tests given by psychologists and others, either within the Burlington School System or outside it. Say, at Mass. General.

A [Continuing.] Dr. Levine picked out two procedures as forming the basis for his opinion.

The first was the child's strategy in copying geometric shapes, not the child's ultimate performance, which as your Honor recalls, was good or described as perfect, I believe, but how the child went about it.

Now, the issue of the strategy of how one goes about copying geometric shapes and what it tells one about brain function is one on which I wrote a fundamental paper in 1968, and which I acknowledge.

[4-138] The knowledge that I have tells me that the performance that Dr. Levine described, could arise from a number of different causes. Specifically, it could arise from anxiety. The reason is that when a person is anxious, they tend to focus their attention on just a very small component of what's there. And when the test has multiple components, like a complex figure to be copied bit by bit, then that child who is anxious, or any person who is anxious, will lock their attention on one component and encounter the kind of difficulty described.

Now, Dr. Levine claimed that Michael was not anxious when he took the test, but his colleague, Dr. Szlyk, who examined Michael at the same time as a psychiatrist, said that he was. And it's hard to imagine Michael not being anxious under those circumstances.

Secondly, insofar as Michael did have a problem with this kind of performance, as I described in the paper to which I have referred, as many others have described and confirmed, that kind of difficulty relates to a part of the brain quite different from that in which language is involved. Namely, the right hemisphere or the left hemisphere of the brain.

What I'm addressing, here, is what we call the construct validity. Meaning, given that the child [4-139] performed in this way: What does this tell us about anything else than the fact that he did so? What does it tell us, specifically, about his difficulty in learning to read?

Now, it will generally be supposed that the kind of difficulty in copying shapes that was described, bears no relation whatever to facilitate reading. In other words, there is a disassociation, as we say, between a person's ability in these two matters, so that they can be good in one, but not necessarily good in the other.

THE COURT: Even though, as I understood Dr. Levine to say, the inability to see the whole is a fact. Assume for the moment that it is a fact. That does not affect a person's ability to see the word as a whole?

THE WITNESS: No. In fact, there are many patients who have, as I've mentioned, right hemisphere damage which is so severe, that they could not find their way at all around this courtroom, and their reading is unimpaired. Such, is a localization of different types of functions in the brain. And this has been documented many times by myself and many others.

A [Continuing.] However, the other tests that Dr. Levine [4-140] quoted, does go to the heart of the matter because it does deal with reading. Namely, the Monroe-Sherman Test, or word discrimination, which is mentioned on Page 11 of his report.

And as your Honor will recall, Dr. Levine explained that in this test, the child is asked to read words in context which make the meaning either meaningful or nonsense. And the position that Dr. Levine took in interpreting his findings was that Michael had great trouble with word envelopes, with the configurization of words as a root, to understanding the word as written. As printed.

Now, what I would wish to point out, your Honor, is that this is a test of reading achievement. If one wishes to draw inferences about the nature of the difficulty over and above the severity of the difficulty, one has to show that on such a test the child does much less well than on other relevant tests.

If one wished to interpret the Sherman-Monrose performance as characterizing Michael's most vulnerable point, then one has to show that on other tests of other aspects of reading, Michael does much better, relatively speaking, even though he may not do well.

THE COURT: Wait a minute. Try that again.

[4-141] THE WITNESS: Yes.

A [Continuing.] Reading is a complex process with many components. Different tests of reading put strain on different components of that process. That's oral reading, that's reading comprehension, that's word recognition, and so on and so forth.

Now, if you wish to take one of the tests, in this case, the Sherman-Monroe, and say: Because he had trouble here, that shows that his real basic problem is X. Then you have to show that he had more trouble here than in these other tests. Otherwise, he merely was bad at everything with reading, and no specific inference can be drawn.

Now, when one looks at the report that Dr. Levine's group produced, in fact, he scored at the grade level of 3.7 on the Monroe-Sherman Tests, which was, for him, relatively speaking, not at all bad. And, in fact, he scored better on that test than he did on other tests described on the previous page, when he was at early second grade level.

So I do not believe one can single out an imperfect performance on that test as indicative of a particular kind of, say, dyslexia, when the case has not been made that there was a selective difficulty there.

[4-142] The final point I want to make in answer to Mr. Berman's question is that I agreed with Dr. Levine point that anxiety would compound and aggravate weak attention.

And I am of the opinion that this child has an attention deficit; that it is definite; that anxiety would make it worse; and that whether there are underlying other difficulties, as well, is really preponderable for the reasons that I have stated.

Q With respect to the school year 1979-1980, have you an opinion, Dr. Kinsbourne, as to whether the Carroll School was an appropriate placement for Michael Panico?

A I do.

MR. ROSENBERG: Objection, your Honor. I don't even believe he visited the Carroll School in 1979-1980.

THE COURT: I thought he said he went there at some point.

MR. BERMAN: No, your Honor, he did not. And I don't —

THE COURT: He can do it on the basis of testimony he heard.

I'll allow it.

Q Would you please state what your opinion is?

A I have an opinion, and my opinion is that it was not [4-143] an adequate placement.

THE COURT: Not an adequate placement?

MR. BERMAN: Appropriate.

THE WITNESS: Appropriate. I'm sorry.

Q Would you please state the basis for your opinion, Dr. Kinsbourne?

A Yes. I have three reasons for this opinion.

The first is Michael's unsatisfactory progress while there. Second is based on the method of instruction used. And the third is based on the restrictive nature of that setting, which I think is unnecessary for this particular child.

With respect to the progress actually made, if I may refer to the document presented as a listing of test results by the Carroll School over several years. Trying to get a picture from such a chart of this child's progress is, in fact, quite difficult, because there are wild fluctuations of performance; as, indeed, is typical of a hyperactive or attention-deficient child. And some of the contradictions that one hears and that I heard in listening these few days between appraisals of how well the

child did in one or another setting, how one often hears when attention is fluctuating. And these are performance differences. Basic knowledge is not necessarily always tapped by the test. [4-144] However, we still do have here, at least, some objective figures to give us a guideline.

Looking at these figures and discounting, which I feel we should, for the reasons that I'm prepared to give, the figures under the heading of "September '79," one then looks, first at the Gray Oral Reading, which was at 2.8, that's the eighth month into the second grade, on 5/80; and at 4.2 at 9/81.

This gives one, a gain of a year and four months, which is commensurate with the passage of time, but certainly not remedial in that the gap is not being closed between this child's achievement level and that expected of a normal child of comparable age.

He fares less well on other tests.

With respect to the Stanford Achievement Test, we see that from 5/80 till 9/81, he has gained one year and five months. And we see that in the Gates-MacGinitie he has gained from 2/80 till 1/82, that is one month short of two years, from 2.5 to 3.3.

He does better on the vocabulary part of the Stanford Achievement Test, going from 3.8 to a 6.8 in a year and four months.

But then, again, when one comes down to the [4-145] spelling test at the bottom, the Stanford Dictated Test, one sees, again, rather minimal progress.

I would further point out that as early as March 1978, three of these tests were administered, not by the Burlington School System but by the Mass. General Hospital. And in two of them, he was then recorded as being within the second grade level, and one of them the third grade level.

So it cannot really be argued that there has been a breakthrough in the period of time in which he has been at the Carroll School.

The second point that I would like to make, your Honor, has to do with the Carroll School program, specifically this child, meaning no criticism of the school in any other way.

The dedication of the Public School to a particular approach, the Orton-Gillingham, is excellent where it works.

In this case, however, it patently has not. It was used for a year and a half by Mrs. Black in the Burlington System, and it has now been used for another two and a half years or more. And after four years, we have just reviewed where we are.

Now, it seems to me that a child of Michael's type needs a flexible and eclectic approach, which will [4-146] react to failure to make progress by shifting ground to some other methodology or added methodology.

And it is not clear to me that Michael's teachers had the experience and the breadth of knowledge of teaching methods to be able to do this with the best way in the world.

The third point I would like to make, and the final one, is that much has been made and much often is made of the desirability of having a child, who is failing substantially, be with a peer group of comparable failure. And up to a point, there is a core of usefulness in that the child should certainly know he is not the only one in this predicament.

However, that is not to say that one should pretend to the child that nothing is happening and nothing is wrong, and to move him into an artificial environment where his failure is the norm.

What is more important is that the child should learn, as we must all, that whatever we do, there will be somebody who does it better, and there will be many things we do badly.

What he needs is not to pretend that isn't the case, but support in grasping the fact and enduring the fact and accommodating to the fact that it is the case.

[4-147] And if the child is able to be given an adequate program of instruction, then it is superior to give that program in the context of a reality within which he will, in any case, have to live for the rest of his life.

So that, in my opinion, if a child is able to receive adequate instruction in a setting where mainstreaming is possible, in a public setting, then there is only one other reason for, nevertheless, sending the child to a residential or specialized institution. That reason would be unsatisfactory nature of the child's total environment, home and school.

If the home, as well as the school, is a disaster area, if everything is terrible, then removing the child out of the setting altogether is justified for a clean break.

Now, it is the case, in my opinion, that Mr. Panico's ingrossed attention in Michael's reading, as he has described in his testimony, is potentially detrimental to Michael.

However, I've heard nothing, in general, on the record, which would contradict the view that Michael enjoyed an excellent family situation. And I have no reason to suppose that that reason would [4-148] apply in this particular case.

So my final point in summary is that given adequate and appropriate instruction, the possible, in a public-school setting, it would, for the reasons given, be better to have it there than to have instruction even of comparable excellence in an institution.

THE COURT: Do you have other questions?

MR. BERMAN: I have one other question.

Well, I'll do without the question. No further questions.

THE COURT: Well, do you have any cross-examination?

MR. ROSENBERG: I have one question.

Me or Mr. Berman?

THE COURT: Mr. Berman has given up his question so that you might have yours.

MR. ROSENBERG: That's very kind of him. I appreciate it.

[4-149] Cross-Examination by Mr. Rosenberg

Q Do I understand you to say, Dr. Kinsbourne, that you agree with Dr. Levine's assessment of Michael's attention or behavioral problems?

A In my opinion, Dr. Levine and I are using different language to say the same thing; that Michael is, indeed, hyperactive or suffering from attention-deficit disorder.

Q So the answer to my question is yes?

A Yes.

MR. ROSENBERG: Thank you.

THE COURT: Dr. Kinsbourne, if Michael were in — that is, if one were to find that Dr. Levine's diagnosis is correct and that Michael has a visual perception difficulty, would the McAleer classroom, as it was outlined in evidence, be an appropriate place to deal with that difficulty?

THE WITNESS: It would, because it addresses that difficulty. In other words, the emphasis on sight vocabulary that we have heard about, the emphasis on fluency. The Learning Master I referred to in my previous testimony. These are devices pertinent on increasing fluency in identifying visual patterns, rather than going through a painful phonic, step-by-step approach, which was useful and which he has mastered, [4-150] but where he is now stuck.

THE COURT: Anything else?

MR. BERMAN: I have no further witnesses, your Honor.

THE COURT: Thank you, Dr. Kinsbourne, you're excused.

[The following was filed in the District Court on October 29, 1982, as an attachment to the State Defendant's Memorandum in Support of its Opposition to Plaintiffs' proposed form of judgment.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF BURLINGTON and the
SCHOOL COMMITTEE FOR THE
TOWN OF BURLINGTON,
Plaintiffs

v. CIVIL ACTION

THE DEPARTMENT OF EDUCATION OF NO. 80-359-Z
THE COMMONWEALTH OF MASSACHUSETTS
and JOHN DOE, as he is father and
next friend of JOHN DOE, JR.,
Defendants

AFFIDAVIT OF THOMAS COLLINS

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1. My name is Thomas Collins. I am employed by the Department of Education, serving as the Director of the Bureau of Data Collection and Reporting.

2. Pursuant to the provisions of General Laws Chapter 72, Sections 3-5, and Chapter 70, Section 4, all school districts are required annually to submit pupil and financial data to the Department of Education. This information is reported in a document titled, "End of Year School Returns: Pupil and Financial Report" (End of Year Report), which is certified as to accuracy under pains and penalty of perjury by the school superintendent and city or town auditor. The Bureau of Data Collection and Reporting receives the End of Year Reports and under my direction processes the information contained therein.

3. Utilizing data collected from the End of Year Reports the Department of Education, through the Bureau of Data Collection, annually prepares a summary of average per pupil expenditures for each school district. The calculations show each district's

average costs for regular, bilingual, special, and occupational day educational programs and for the four programs as a whole. In the case of special needs expenditures, the average per pupil expenditures are calculated by prototype: modified regular education programs, programs with less than 25% of the time outside the regular classroom, programs with 25% to 60% outside the regular classroom, substantially separate public school-based programs, private day school placements, private residential school placements, home or hospital-based programs, and preschool programs.

4. In calculating the average per pupil expenditures for special education programs the Bureau bases its calculation on information the End of Year Report provides, which includes: 1) instructional expenditures for each prototype; 2) transportation expenditures for each prototype; 3) a count of children in each prototype; 4) allocated overhead costs attributable to the prototype; and 5) tuition expenditures in each prototype.

5. This information has been published by the Department for the school years, 1979-80 and 1980-81, in publications titled, "Per Pupil Expenditure, 1979-1980," and "Per Pupil Expenditure, 1980-1981." The comparable publication for the 1981-82 school year has not yet been issued. A copy of each publication is attached hereto as Appendix A and Appendix B.

6. In the school year 1979-1980, Burlington's average per pupil expenditure for substantially separate (502.4 prototype) special education programs was $4015. In the school year 1980-1981, Burlington's average per pupil expenditure for the same special education prototype was $7801.

7. For the school year 1981-1982. I have calculated Burlington's average per pupil expenditure for substantially separate special education programs, utilizing the Bureau's standard procedures described above and relying upon the financial and pupil data reported by Burlington in its End of Year Report for the 1981-1982 school year, which was received by the Bureau of Data Collection and Reporting on September 13, 1982. The amount for the 1981-1982 school year was $6783.

Signed under pains and penalties of perjury this twenty-seventh day of October 1982.

/s/ Thomas Collins

Date: October 27, 1982

_____

Notary Public

My commission expires: January 19, 1986.

[The following was filed in the District Court on January 17, 1983.]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

TOWN OF BURLINGTON and the SCHOOL COMMITTEE FOR THE TOWN OF BURLINGTON,
Plaintiffs,

VS.

THE DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS and JOHN DOE as he is father and next friend of JOHN DOE, JR.,
Defendants.

CIVIL ACTION NO. 80-359-Z

STIPULATION OF FACTS ON PLAINTIFFS' REQUEST FOR REIMBURSEMENT

With respect to plaintiffs' request that the judgment to be entered in the above-entitled action include sums expended by plaintiffs for private school tuition of Michael Panico after September 1, 1979, the parties hereby stipulate that the statements of fact herein made are true and may so far as they are material be considered by the Court; but the parties do not hereby stipulate that any such statement is material or waive their right to offer other evidence.

1. Exclusive of reimbursement received from the Commonwealth of Massachusetts for the education of special needs Children, the average cost of educating a special needs child in the Burlington public schools was $6,050.00 in the 1979-1980 school year, $6,361.00 in the 1980-1981 school year and $7,069.00 in the 1981-1982 school year.

2. In the 1980-1981 school year plaintiffs paid to the Carroll School $5,685.00 in tuition for the education of Michael Panico.

3. In the 1981-1982 school year plaintiffs paid to the Carroll School $5,850.00 in tuition for the education of Michael Panico.

4. In the course of the 1980-1981 and 1981-1982 school years plaintiffs paid Michael Panico's parents $1,129.68 to reimburse them for transporting him to and from the Carroll School.

5. The average cost to plaintiffs of school transportation for children with special needs in the period from September, 1979 to June, 1982 was $2,264.00 per year.

6. The average State contribution to Burlington for a full time equivalent special education student excluding transportation costs was $1,384.00 for the school year 1979-1980, $1,465.00 for the school year 1980-1981, and $1,579.00 for the school year 1981-1982.

/s/ _____
David Berman
COUNSEL FOR PLAINTIFF

/s/ _____
Ellen Janos
COUNSEL FOR DEFENDANT
STATE DEPARTMENT OF EDUCATION

/s/ _____
David Rosenberg
COUNSEL FOR DEFENDANT PANICOS

DATE:

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON and the SCHOOL COMMITTEE FOR THE TOWN OF BURLINGTON

vs.

THE DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS and JOHN DOE, ppa, JOHN DOE, JR.

JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision dated August 13, 1982, and the Opinion dated March 7, 1983, it is

Ordered and Adjudged

1. That the appropriate educational placement for Michael Panico for the school year 1979-1980 was at the Pine Glen School as provided in the Individualized Educational Plan drawn up by plaintiffs in June 1979 and the plaintiffs are not responsible for any costs incurred in educating Michael Panico at the Carrol School for the school year 1979-1980.

2. That defendant Robert A. Panico having failed to prove that Michael Panico's placement at the Pine Glen School would have been inappropriate, plaintiffs are not liable for the costs incurred in educating Michael Panico at the Carroll School for the school years 1980-1982.

3. That defendant Robert A. Panico pay to plaintiffs the sum of $8,449.00, which represents the amount of tuition paid by plaintiffs on behalf of Michael for the school years 1980-1981 ($5,685.00); and 1981-82 ($5,850), less the sum of reimbursements received by plaintiff from the state in each of said years ($1,465.00 and $1,579.00, respectively), and the payment to Dr. Levine ($42.00).

4. That the Clerk of this Court repay to plaintiffs the sum of seven thousand seven hundred thirty-nine and 88/100 ($7,739.88) dollars deposited with him by plaintiffs, together with any and all interest earned on said deposit.

5. That the counterclaims be dismissed with prejudice.

6. That plaintiffs recover their costs.

May 9, 1983
DATE

/s/_____
Rya W. Zobel
DISTRICT JUDGE

SUPREME COURT of the UNITED STATES

No. 84-433

School Committee of the Town of Burlington,

Massachusetts, et al.,

Petitioners

v.

Department of Education of the Commonwealth

of Massachusetts, et al.

ORDER ALLOWING CERTIORARI.

Filed December 3, 1984.

The petition herein for a writ of certiorari to the United States Court of appeals for the First Circuit is granted, limited to Questions I and V presented by the petition.

A true copy ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the United States
By /s/

C.W. Vasil
Deputy